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HOUSING CODE ADMINISTRATION AND ENFORCEMENT

Spencer Paratt

Maxwell Graduate School of Citizenship and Public Affairs
Syracuse, New York

1970

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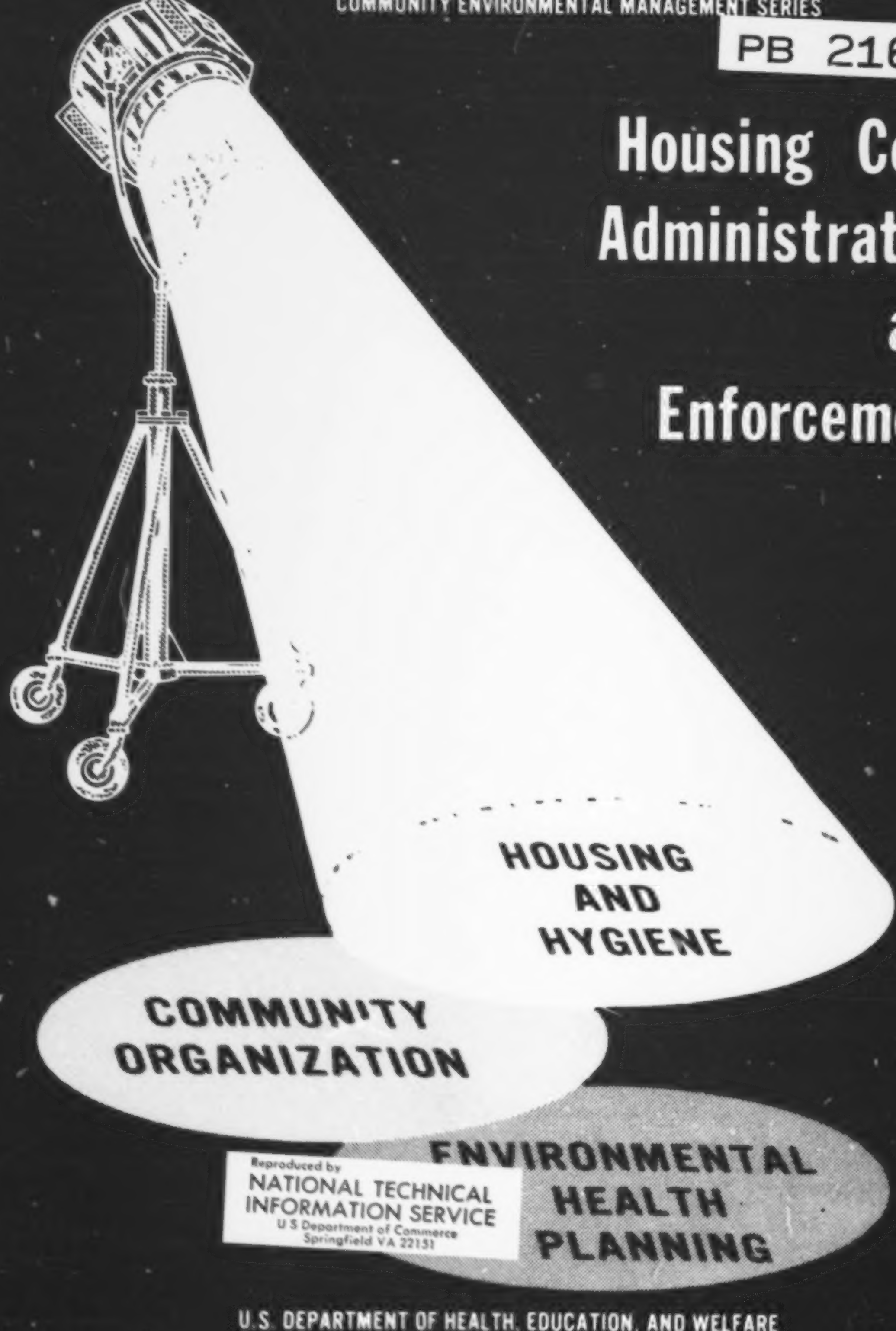
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U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Health Service
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Environmental Control Administration

HOUSING CODE ADMINISTRATION AND ENFORCEMENT

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U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
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Bureau of Community Environmental Management
1970

I

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To the many people, especially housing code administrators, who gave of their time and knowledge, appreciation is extended. When specific contributions are referred to in the study, policy has been followed of identifying the contributor either in the text or in a footnote. To those who contributed research time, thanks is given, especially to my wife, without whose help this project would not have achieved its present format.

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Spencer D. Parratt

Environmental Health Service Series on Housing and Hygiene

I. Model State Housing Societies Law

II. Housing Code Administration and Enforcement

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FOREWORD

This publication is the result of one of several contracts that the Bureau of Community Environmental Management has supported in the field of Housing Code Enforcement and Administration. Professor Parratt has made an excellent contribution to this subject through his compilation of existing knowledge, his analysis of the strengths and weaknesses of existing practices and his keen insight into the program needs of the future.

This manuscript is designed for use by persons concerned with enforcement of housing codes and will, we hope, stimulate the development of new approaches to enforcement.

Robert E. Novick
Director, Bureau of Community
Environmental Management

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INTRODUCTION

THE FIVE PHASES OF HOUSING REGULATIONS

Regulation of occupancy and use of housing falls into four phases with a fifth phase emerging. The common law left such matters to private owners or to bargaining between landlords and tenants under complex patterns that spread their shadow into the present time. Regulation of housing, then, is essentially through legislative enactment. Historically such legislation has been closely interrelated with public health; the germ theory of disease has had substantial impact, and the evolution of the attempts to regulate housing presents a most extraordinary study in American federalism.

Phase I

Following the Civil War, in 1867, a tenement house law was enacted in New York. It was both recognition of, and assumption of responsibility to correct, the miserable housing conditions in New York City. It was, as its name suggests, directed at multiple dwellings. Later the regulation of tenement houses was extended to smaller cities in New York State. Similar legislation was enacted in several other states. Characteristically no effective administrative system was created, and this lack of effectiveness has distinguished such legislation down to the present time.

Phase II

Housing regulation became associated with public health administration, and it is in the expertness of health administrators that the hard core of minimum standards continues to be found, although current housing codes far exceed the scope supportable with scientific proof. Health administration has been, and is, characterized by broad delegations of discretion, and housing regulations developed as part and parcel of sanitary or health codes. This shifted responsibilities to local health departments. It also resulted in divergence in the extent to which administrators considered the reach of their competencies. Nearly all health departments become deeply involved in regulation of water supplies, sewage disposal, foods and food handling, elimination of garbage, insect and vermin control, and control of infectious diseases. Interest in housing as a central subject languished in most departments but not in all.

While public health departments approached occupancy and use of housing as a secondary issue, building codes centering around physical safety developed. This development was not through expanded discretionary authority but through specification codes that permitted relatively ministerial enforcement. Fire codes became standard equipment of cities. As these became more inclusive of subject matter, the scope of housing regulations assumed sharper definition of occupancy and use. The combination of codes became interdependent controls. Land-use planning and zoning became recognized functions as the scope and substance of police power were thrashed out in the courts.

Phase III

In the 1940's, Dr. C. E. A. Winslow, leading rather than representing the American Public Health Association, through its Committee on the Hygiene of Housing, undertook to establish a functional housing code. The target was health officials in urban centers.

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The committee depended, to a marked extent, upon the experiences of Dr. Huntington Williams of Baltimore and Dr. Edward R. Krumbeigel of Milwaukee. Both of these practicing health officials had assembled workable combinations of health-related provisions and had obtained local political acceptance. Effort was made to assemble experiences in other cities. The resultant product was to become a watershed in housing codes and code administration. It became known as the APHA minimum standards code. It was published in 1952 and is an ancestor to all the somewhat standardized codes of today.

The committee did not consider that it was making more than a package designed to stimulate public health administrators in seeking fuller control over troublesome factors in the urban environment. The purpose was to sharpen attention upon the gap that existed between the scope of relevant knowledge and the housing conditions in most cities. These sponsors were well aware that public health administrators generally were not fully in accord with such an expanded range of functions as the code provided; the purpose was to stimulate interest in stemming the rapidly developing forces causative of urban decay and deterioration. It was hoped that a growing number of cities would follow the committee's lead and convince their political compatriots that action was becoming necessary and that a significant tool had been forged, or at least partially developed.

Phase IV

The entry of the Federal Government into the field with purpose to turn the tide of urban decay had a fundamental impact upon the history of the APHA code. This entry had a double-barreled thrust. Starting in the midthirties the widespread development of federally financed public housing created new and higher criteria against which housing could be measured. Moreover, the Public Health Service undertook to develop criteria against which private housing could be evaluated. Both of these factors played into the hands of those concerned with broader policies in urban development or renewal. Under the 1949 act and pressed further under the legislation of 1954, the initiative in the regulation of housing moved into the strong hands of the Federal Government.

The APHA committee did not carry its analysis to development of an effective enforcement system. Such matters were left to each city or other unit. Looking backward from the present time, one can say that the complexity of problems inherent in housing code administration was not foreseen by the committee. Unfortunately overemphasis upon the use of criminal penalties became institutionalized.

Urban Renewal has pressed for codes and for their administration. Practically no attention has been given to developing administrative innovation better suited to the ends sought. Even less attention has been given to securing a solid local understanding in the light of which political forces can provide effective democratic support to administrative norms and methods.

The Urban Renewal approach has emphasized selective enforcement in terms of areas or zones. These zones have little relationship to the zones created by city planners; they are vehicles in the attack upon blight or deterioration. Practically no attention has been paid to administrative policies to ensure a reasonable relation to existing conditions of political values, and the distribution of economic burdens. Emphasis has been placed upon ''beefing up'' the criminal penalty system.

Generally speaking, the criminal penalty approach to housing codes is misguided and creates hostility among landlords and dissatisfaction within local electorates. An important off-shoot of this dissatisfaction is the increasing awareness by states that they are losing responsible control over local governmental processes through the encroachment of Federal requirements.

Phase V

The most dynamic factor in housing code administration, at this time, is the resurgence of state government to reclaim its historic role, a role that has languished since the beginning of the century. This movement is in its early stages. Its scope and the evaluation of its results are beyond this study, which is concerned with the existing machinery, reach, and process of local code administration

The nature of the stirring of state interests should be a subject projected for future study. The most important aspect of the new state programs is the attempt to create a better coordinated approach to local problems. Health department discretion has extended over statewide areas, but little has been done to provide effective administrative enforcement. Reliance has been placed in local officials who respond proportionately to local pressures.

California, for example, since 1923 has experimented with housing-oriented provisions in a Health and Safety Code but has relied upon city and county enforcement. In 1963, 1965, and 1967 this code was amended. A confrontation with HUD officials developed in 1967 over the proper locus of power. Since 1965 the State Department of Housing and Community Development has been given responsibility to enforce minimum standards if local agencies fail. The rule-making power of the department gives both flexibility and opportunity for experimentation. A most unusual feature in the California approach is that substantive provisions must be "reasonably consistent" with standards promulgated by the International Conference of Building Officials, which is a proprietary system under independent control and without responsibility to any government at all.[1] At least this puts the international people above both state and Federal administrative reach—certainly a unique element in American government.

Hawaii has undertaken an interesting variant of the California approach. Both have theoretical minimum statewide standards. Hawaii has patterned its statewide code from the Uniform Housing Code having the same sponsorship as California. Just what is being done to give more than theoretical status to this experiment is uncertain. The state has not, apparently, superseded the authority of "counties" to adopt similar codes and enforce them as county legislation. At least the state lacks staff to undertake direct enforcement insofar as available evidence indicates. The centralizing authority in Hawaii is the Health Department.

The Hawaiian State Health Department does not exercise control over the administrative procedures of the local governments. As of October 2, 1968, the Director of Health "was not aware that any of the departments of the city and county of Honolulu has as yet adopted formal rules of practice and procedure."[2] It is too early to evaluate Hawaii's program.

New York State has the most confused system of housing regulation in the nation. The Division of Housing and Community Renewal, with Housing and Home Finance Agency aid, developed and produced a housing code for local adoption. This was modeled upon the APHA code and has been adopted by a number of cities. It cannot be adopted by counties, because of lack of enabling legislation. In 1967 the New York State Public Health Council, within the scope of its rule-making powers, adopted a version of the revised APHA code, and this version has been made subject to local acceptance by local health departments, including counties when these units have health departments. In the meantime, the Division of Housing has revised its code. Some question exists about the binding effect of revisionary standards on local units that have previously adopted the APHA edition. The Health Department code, however, offers a bait to local governments—half of the administrative costs will be met by the state. The impact of this code, adopted as Part 21 of the Sanitary Code, has yet to be determined. A curious element is that the State Commissioner of Health is presumed to enforce the standards of the Health Department code where housing conditions create a danger or hazard to public health. Presumably the state pays the entire cost of such enforcement. The net result of this state of affairs is that cities, or in some instances counties or townships, can (1) choose among housing codes that are developed independently to meet Urban Renewal standards and pay the entire cost of enforcement, less such special subsidies as Urban Renewal provides; (2) adopt a Division of Housing and Community Renewal code and pay the entire enforcement costs; or (3) adopt the Health Department-sponsored code and have half the cost paid by the state. Some effort is now underway to bring better order into the situation, which is further confused by the hangover of ''multiple-residence'' and ''multiple-dwelling'' statutes that apply to different classifications of cities and are the direct descendants of the post-Civil War tenement house laws. Although New York State has an Office for Local Government, this agency has been bypassed in the interdepartmental struggle for power. This office was created in the executive department ''to advise and assist the Governor and the localities with respect to policies and problems of local government.''[3]

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[1] See analysis of Guideline G-11, Chapter 11, page 101.

[2] Letter from Walter B. Quisenberry, M.D., State Director of Health, Hawaii.

The situation in New York is further complicated by the fact that Urban Renewal financed a separate study of housing code problems in New York City, and for practical purposes New York City is only nominally part of the squabble about codes in the rest of the state. New York City has its own code, and this is integrated, after a fashion, with the controls relating to housing, except for public health and general land use planning. The omission of these controls, and particularly of the public health official's function, is to be deplored if focus upon a fuller spectrum of housing controls is to be achieved.

What seems to be the best integrated effort to assert state responsibility and control is developing in New Jersey. Paul Ylvisaker heads this experiment. This program is a sharp break with the tradition of home rule that was so prominent in the 1920's and early 1930's. Like New York, New Jersey has a tenement house law that dates back to 1904, but this is being superseded rather than paralleled. The program is called ''State-Local Cooperative Code Enforcement'' as it relates to housing codes, and the state agency has a staff of inspectors for direct action. A partial assumption of administrative costs is proposed for local enforcement agencies.

In Illinois, a joint legislative committee has made inquiry of the director of this study about the desirability of a statewide minimum code system. In Michigan, substantial legislation seeking enforcement of housing standards through forced bankruptcy proceedings has been enacted.

Connecticut has, under 1967 legislation, established a new State Department of Community Affairs. It is expected that code enforcement will involve a distribution of costs between local and state governments for ''concentrated code enforcement programs.'' The Connecticut approach puts a high priority upon a broader concept of environmental factors with state administrative responsibility partially to finance ''approved'' community development action plans.

The preoccupation of governments with the theory that landlords willfully, ignorantly, or incompetently allow their low-rental housing to deteriorate is evidenced in recent Connecticut legislation (1967) expanding the conditions under which courts can appoint receivers for properties evidencing code violations.

In 1967, Pennsylvania enacted legislation providing subsidies for concentrated code enforcement and spot demolition. A Department of Community Affairs was provided. Some effort is made to recognize the need for larger administrative areas in which competence can be reasonably expected. Minimum housing standards having statewide effect are proposed. As in New York, the integration of fire and safety standards into a unified control system is being examined. The Pennsylvania State Board of Health, apparently in parallel with the Department of Community Affairs, is also studying the health-related aspects of statewide standards.

Massachusetts is in process of change relative to the scope of Health Department jurisdiction affecting housing. In 1960, the Sanitary Code was expanded to cover a wider range of housing matters. An effort is being made to coordinate local and state enforcement efforts. Technical assistance is provided to local governments, but manpower shortage has so far limited direct enforcement by the State Health Department. A special study group is said to be looking into the problem. Considerable local interest exists, and the direction toward greater concern by the state government seems clearly established. In theory, a basic code is mandatory throughout the state, but additional resources will be necessary to provide dynamics. A Department of Community Affairs, newly created, will have undefined relations with the Health Department in the Massachusetts approach.

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[3] New York State Legislative Manual, 1967, p. 507 ff.

Other states are considering or experimenting with change in the direction of greater state involvement in housing regulation systems. Delaware has a new Department of Housing with a duty to recommend a statewide housing code; Minnesota, in 1967, created an Office of Local Affairs in a State Planning Agency; Ohio, a Department of Urban Affairs in the same year; Rhode Island in 1968 created a Department of Community Affairs; and Maryland is reassessing its long-established system.

The time will arrive within a year or so when the accumulated experience of the new state programs can be analyzed and assessed. At present there is inadequate communication among these pioneering efforts. The struggling attempt to find coordination of housing affecting programs in New York City and Miami should be known to those seeking integration of state functions. Even before the subject ripens for research analysis, some conference discussion is indicated. Unfortunately, the Council of State Governments has no functional relationships with the American Public Health Association. Some ad hoc involvement would open opportunities for exchange of information and development of possible models that could become foundation for legislation. Paralleling the need for consultive relationships between program developers of the broader aspects of housing regulation is the need for better communication among counties and cities facing the rapidly expanding ''mobile home'' bulge of habitable units. It is timely that research leading toward better understanding of this aspect of housing be undertaken; it has proved to be beyond the scope of the present study.

The following chapters can be characterized as a descriptive analysis of the fourth phase of housing regulation. They are dominated by the realizations that (1) regulation involves social and economic factors, and that (2) penal systems are not appropriate in situations in which laws are neither well understood nor developed through electorate sympathies, and also (3) by consideration of the programs of the Department of Housing and Urban Development operating directly on local governments. An effort has been made to provide suggestive guidance for improvement of the administrative processes; the study is only secondarily concerned with substantive scope. Since the perspective presumes that the fourth phase is about to yield to a fifth in which states play a much more important role and in which coordination of environmental controls will play a greater part, no attempt has been made to perfect what is considered to be a transitional stage in housing controls. What is presented is designed to stir realizations that economic problems cannot be successfully coped with through penalty systems and that low-rental housing seems destined for further subsidy and quite possibly for consideration as being subject to public utility-type regulation. Either a successful return to basic responsibilities in the states must emerge to further the traditional federal principle in American government or we are on the verge of reconstruction of an important aspect of that system.

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Chapter 1

LOCAL CODE ADMINISTRATION - PART I

Few generalizations can be made about the ''typical'' housing code. Each local jurisdiction, even when it chooses a national standard code, usually imposes its own and generally inconsequential additions and deletions. Consequently each code differs in detail from the next. It can be said, however, that as a local code undergoes amending and changes over the years, the requirements are far more likely to be increased in severity than decreased. This escalation is difficult to justify on health or safety grounds. The most noticeable change occurring in many codes in the past year or two has been the elimination of shared bathroom facilities in dwelling units. This change, as many others, reflects to a considerable extent local response to Federal urban renewal requirements.

Such modifications in minimum standards are more likely to affect owners and landlords than tenants, and require no additional competencies on the part of the code administration. But other changes are occurring that considerably affect the administration and require different or supplementary criteria. Several of these changes have been selected as significant after an examination of a large number of codes because they show the dynamics of code administration and have the greatest impact on administration.

One of these elements, territorial jurisdiction, is primarily a local political problem under state enabling legislation. The impact of urban renewal requirements is response to an outside force and largely beyond local management. These two elements are discussed in the following pages.

Territorial Jurisdiction

There is no scientific base for the conclusion that occupancy and facility needs have a meaningful relationship to political boundary lines. Historically the problem was essentially one of rehabilitation of old buildings in urban areas; state legislation was aimed at large cities and enforced by the local city. But the time is past when water, waste, food handling, or housing and environmental problems can be considered limited to urban areas. Fifty years ago, the absence of administrative machinery outside of cities, together with the huddling of the immigrant populations within the large centers, provided justification for city regulation.[1] Increasingly, however, municipal corporate political boundaries have an inverse relationship to expansion of industrial, commercial, residential, and social function. The more dynamic the forces of disruption the more resistant to change become the corporate boundary lines.

Yet the problem of substandard homes is one that today affects as many, if not more, families in nonurban areas as in cities.[2] When it is realized that, of dwelling units built before 1929, approximately 11 million are in central cities, 10 million in rural areas, and 5 million in suburbs,[3] the issue of city-bounded regulation versus nonurban blight and deterioration becomes sharper. What might be called the ''suburban-exurban'' gap in housing code coverage must increasingly demand recognition. There is evidence that the problem is becoming more prominent and that some jurisdictions are attempting solution.

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[1] Even then, Veiller noted ''Housing evils are not confined to cities. Slums are found wherever people live, in small towns, in villages, even in the open prairie. ...'' Veiller, *Housing Reform,* 1910.

[2] Only about 40% of families living in substandard homes in 1960 were in metropolitan areas. (U.S. census figures as given in Bernard Frieden, ''Housing and National Urban Goals,'' *The Metropolitan Engineer,* p. 165.)

EXTRATERRITORIALITY

The vast majority of codes are municipal and effective only within the city limits. But there are exceptions. The 1917 Michigan Housing Law included within its scope all territories ''immediately adjacent and contiguous to the boundaries of any such city (over 100,000) or village and extending for a radial distance of 2½ miles beyond such boundaries in all directions.''[4] This area was reduced to 1¼ miles in code coverage of cities or villages with population between 10,000 and 100,000. Only multiple dwellings were so regulated unless the local legislative body acted to include private and two-family dwellings.

In 1963, Iowa amended its Housing Law to include a similar provision. Every city of 15,000 or more and any dwelling in an area adjacent to and within 1 mile of such municipality, excepting only estates of 10 or more acres, is subject to the state law.[5] Enforcement in the cities is in the health or buildings department, and in the 1-mile contiguous area, by the county board of health. (The applicability of this section was interpreted so that ''any area'' meant only unincorporated areas.)

Acting under state enabling legislation, a few municipalities have extended their authority to inspect beyond their corporate borders. Springfield, Illinois, has a housing ordinance authorizing the housing inspector to inspect not only within the city limits but also ''to a point one-half mile beyond the limits of the city in cases where a condition exists outside the city limits which is detrimental to the health or safety of inhabitants of the city.''[6] Champaign and Urbana, Illinois, have similar provisions in their codes.

This type of provision, although it gives a measure of protection against blight in the immediately contiguous area of the city, attempts to protect, not the occupants of the substandard housing, but only the city dwellers that may be adversely affected. The limits of utility and protection are quickly reached when extraterritoriality is the solution used to circumvent the existing governmental structure and extend regulation beyond its borders. Since population movement does not occur outside of centers in any geometrical fashion but rather in patterns not easily reduced to adjacent circles, this type of regulation does not appear to be the best to control noncity blight.

STATE LEGISLATION

As noted in the introduction, some states have moved in the direction of total state coverage. California, the most notable example, has in recent years moved in the direction of increasing the enforcing authority of county departments of health, housing, or building in carrying out the provisions of state law within their jurisdictions.[7]

Maryland was noted as having a bill pending in the state legislature that would require local subdivisions of the state to enact housing codes by 1970. Counties as well as cities would have to establish minimum housing standards at least as stringent as those established by the state health department by 1969.[8] Maryland, if it passes the bill, would be moving in a direction different from that of California: instead of a state housing law, the state health department would draw up minimum regulations that are more easily modified and more flexible than state law, and at the same time give counties and cities more initiative and responsibility in making their own standards. The bill would allow the state department of health to enforce its minimum standards in the absence of enforcement by local officials, much as the California Department of Industrial Relations is empowered to enforce in the absence of local enforcement.[9]

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[3] *Housing Facts and Trends*, (House and Home, McGraw-Hill, Dodge, 1965), p. 18, using 1960 U.S. Census figures.

[4] Michigan, *Housing Law*, (1951), Article I, sec. 125.401. In 1925–1926 an opinion of the attorney general interpreted this to mean that local officials were to enforce within only a 1-mile radius. Sec. 5.2883, p. 155.

[5] Iowa Code Ann. *Housing Law*, ch. 413, sec. 413.1, 413.121.

[6] Springfield, Illinois, Minimum Housing Standards, as amended (1959) sec. 24.37(a).

[7] West's California Ann. Health and Safety Code, sec. 17960, 17961, 1966 Supplement.

[8] ''Codes Notes,'' Journal of Housing, vol. 25, No. 2 (February 1968), p. 77.

Other states are moving in the direction of passing enabling legislation allowing counties to adopt housing codes. The enabling role of the state is neatly pinpointed in the following excerpt from an article on slum conditions in the suburbs around Little Rock, Arkansas: ''There is no such thing as a building code or a housing standard in Pulaski County. The absence of one is no fault of the county government, which is not permitted by state law to impose or enforce such codes.''[10] An attempt to push through enabling legislation in the Arkansas 1965 General Assembly failed because ''the builders lobbied against it and got it beat.''[11]

Among states that have passed such enabling legislation for counties is Georgia, which in 1961 authorized counties to adopt housing and other codes[12] and permitted them to contract with municipalities and other political subdivisions of the state possessing authority to issue permits and enforce codes.[13] Virginia also has made the county a unit for housing code enforcement. It has authorized counties with populations of more than 2,000 per square mile to ''apply for, accept and utilize grants and other assistance from the Federal Government pursuant to Section 117 of the U.S. Housing Act of 1949 as amended, for the purpose of carrying out programs of concentrated code enforcement and related activities.''[14]

The important role of the Federal Government in fostering expansion of territorial coverage is also shown by a statement explaining the creation of a county code for Jefferson County, Kentucky. A health official noted that the county code was developed primarily ''to enable the county to qualify for Federal funding of an Urban Renewal Project.''[15]

COUNTY HOUSING CODES

The trend toward adoption of county housing codes appears to be growing, although as yet the total number of county codes is small.[16]

Environmental health reports, in a number of counties where studies have been made, have strongly recommended the adoption of county housing codes to stem the spread of deterioration and dilapidation. Erie County, Pa., notes that there are almost as many deteriorating units outside the city as in and that ''The County also has 4.3 percent (3,315) uninhabitable units of which only 605 lie inside City limits. The remaining 2,710 are located in the county or rural areas.''[17] Although generalizations about the ''typical'' county housing code cannot easily be made, a few aspects can be noted.

County codes that are in force are almost invariably under the jurisdiction of the county health department. They must also take into consideration problems not normally associated with cities, such as lack of public water supply and sewers. Occasionally they may take note of rural conditions to the extent of exempting farm worker housing and youth recreational housing from certain requirements,[18] and are more likely than city codes to apply only to rental dwellings. One county housing code director—noting that the code enforcement program has been very successful—states "We have battled to the wire with DHUD about our Housing Code applying only to rental properties—and we have lost—consequently we are going it alone after December 31, 1968, when we lose our certification from the Regional HUD office."[19] It is pertinent that he attributes the success of his program to the fact that every step has been taken after unamimous resolution of the Board of County Commissioners and included both major political parties.

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[9] West's Calif. Code, sec. 17952.

[10] *Arkansas Gazette*, January 28, 1968, p. 1A.

[11] Ibid., p. 2A.

[12] Code of Georgia, Ann. Municipal Corp. Article XVI, sec. 23-2801.

[13] Ibid., sec. 23-2803, 23-2804.

[14] Code of Virginia, Ann. (1966) ch. 290, sec. 27-5.3.

[15] Letter to author from Bruce K. Lane, Chief, Environmental Control, Dept. of Public Health, Louisville, Ky., June 24, 1968.

[16] Of some 200 housing codes examined, only about a dozen were county codes.

[17] *Erieland 2000,* A comprehensive environmental health survey of Erie County, Pa. Section on Housing. (No page numbers.)

[18] Van Buren County, Michigan, Housing Regulation, sec. 8.4.

The Howard County administrator illuminates the comprehensive competency required by the county housing code administrator: "Due to the rural nature of some areas, the very hilly terrain, and the areas where septic systems cannot be installed due to poor percolation, our code as written places a heavy responsibility on the Housing Administrator to evaluate the written report and make some important decisions affecting family relocation, rehabilitation and demolition of substandard structures. Since this is purely a matter of judgement the effectiveness of the code is reflected by the caliber of the enforcement officer and his staff."[20] This particular code is also of interest because it requires licensing of all rental structures.

The Howard County code will be an interesting one to watch, for although it is still a largely rural county, the advent of the new city of Columbia will mean that the county will encompass both city and rural areas within one housing code. With a few exceptions later noted, most counties that encompass large cities follow separate codes for each when a county code is in force. This is the case in the city of Louisville and Jefferson County, Kentucky. Although the codes vary only slightly, they are different and are in different administrations—the city code being enforced by the Department of Building and Housing Inspection, and the county code, by the County Board of Health. In one jurisdiction that has had a longer history of housing code enforcement, a recommendation that both city and county codes be combined, through state legislation, into one single agency was made after a long series of public hearings.[21]

Legislation is needed to accomplish such consolidation, but the venture might well prove worthwhile in allowing greater specialization and efficiency in carrying out increasingly complex operations. There may be problems of coordination of two prosecutory systems, unless the legislature consolidates judicial jurisdiction and prosecutory function.

Another step in the direction of expansion of territorial coverage of housing codes was taken in 1967 by the New York Department of Health when it added new housing regulations to its Sanitary Code. This makes a package housing code available for enforcement by county health districts and city health departments.[22]

Several other county housing codes merit special comment because of their uniqueness.

As stated earlier, most city codes are separate from their contiguous county codes where there are such ordinances. An exception is Marion County, Indiana, with Indianapolis at its hub. The Marion County Health and Hospital Corporation, a special municipal corporation created by state legislative action in 1951, has charge of environmental sanitation under its Division of Public Health. This includes enforcement of minimum standards for housing for the county, including Indianapolis. The housing program is large, was recently expanded to 45 positions,[23] and can take advantage of its size to hire a part-time attorney to serve as deputy prosecutor, in addition to using the Health and Hospital Corporation counsel. The director of the housing program says of it: ''From an employee point of view I find this agency ideal in accomplishing some of our goals.''[24]

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[19] Letter to the author from G.Y. Clark, Director, Department of Building and Housing, Howard County, Maryland, July 17, 1968.

[20] Ibid.

[21] Pittsburgh and Allegheny County, Pa., as noted in "Codes Notes," *Journal of Housing*, vol. 23, No. 9 (October 1966), p. 515.

[22] Part 21: *Housing*, New York State Sanitary Code, ch. I, (1967).

[23] Letter to author from Albert L. Klatte, Director, Bureau of Environmental Sanitation, May 29, 1968.

Honolulu also has a city-county code, but the local code, and the state itself, has not been in existence long enough to provide much useful experience. Denver's City-County Housing Code might also be mentioned here, but since the city and county are coterminous, there are no jurisdictional problems.

Different governmental forms make coordination of interrelated functions possible at different levels. The creation of a ''Little HUD'' in Dade County, Florida, is a further step in city-county integrated enforcement programs. The administration of city-(Miami) county programs under the County Manager creates potentials of achievement difficult to duplicate in typical county governments. Porter Homer, the County Manager, writes:

> As of October 1, 1967, Dade County absorbed the City of Miami Department of Housing and Rehabilitation which previously administered the City Housing Code. Administration of the City and County codes has been consolidated and we expect to be able to show the efficiency of applying different housing code standards to particular areas in order to accommodate differing needs.[25]

Basic rule-making power is in the manager, and he can coordinate function over a relatively wide area involving the public interest of that area as a political unit.

Another experimental approach is the regional code. In 1965 the Greater Egypt Planning Commission had a 701 grant to study the feasibility of a regional code enforcement office.[26] Also in 1965, an area-wide building inspection office was being organized in the 40-city northern Kentucky region.[27] A tricounty joint ''anti-slum'' code was being considered for southern Maryland, to be enforced by a unified group of inspectors.[28] The consideration of regional codes or administration of codes, or of both, points to some of the problems the contemporary code enforcement authority faces.

There are two approaches to determining the jurisdiction considered appropriate to administrative success. One emphasizes the technical competencies needed and places first stress on the kinds of expertness related to optimum achievement. If this approach is given priority, the administrative area will be large enough to support staff specialization.

The second approach is to subordinate expertness to political structures and sacrifice efficiency to political acceptability and regard for traditional units of government. In the long run, this may prove self-defeating, even though it is popular and respects established bases of ''home rule.'' Of course, this dilemma is not peculiar to housing codes. The national policy generally is to use local—usually city—governments with little regard to their capability as efficient code administrative agencies.

Urban Renewal recognizes local jurisdictions with primary emphasis upon their eligibility for urban renewal projects. The requirements of the Workable Program in small jurisdictions unable to provide useful work for the range of expertness needed for effective housing code enforcement is productive of unnecessarily incompetent administrations—especially when small jurisdictions are contiguous with other government units concerned with urban renewal problems. It is not difficult to recommend that Urban Renewal might well reexamine its policies relating to this problem.

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[24] Ibid.

[25] Letter to author from Porter W. Homer, Dade County Manager, February 27, 1968.

[26] Richard Hage, ''Kentucky's Small Communities,'' *Journal of Housing*, vol. 22, No. 5 (1965), p. 246.

[27] Ibid.

[28] *Journal of Housing*, vol. 22, No. 2 (1965), p. 101.

Urban Renewal and the Intra-City "Zone"

A city is a heterogeneous collection of people, structures, and neighborhoods. Trying to superimpose escalating convenience and maintenance requirements over an entire population is both unrealistic and a disservice to those who wish to pay—and can only pay—for minimum standards and amenities.

The idea of a zoned housing code is far from new. It was projected as early as 1927.[29] Later, the Health Commissioner of Milwaukee, Dr. E. R. Krumbiegel, proposed that state enabling legislation authorize Milwaukee to adopt a ''zoned housing code.'' Although it was not passed, the idea proposed has been closely approximated by urban renewal classifications and by the actual enforcement of many municipal housing codes.

As minimum standards are progressively raised—often by directives from HUD—the problems become more acute. Only when standards are truly minimal can their governing a total area be justified. Two authors, concerned over the needless imposition of requirements that force people to spend more than they wish for services while being consequently denied free choice in purchase of housing and housing amenities, stated:

> No objection can properly be made to minimum standards designed to protect the health or safety of the community or to safeguard it against unreasonable costs. However, the history of such regulation shows that so-called ''minimum'' standards frequently have little ascertainable relationship either to health or to social costs. Generally such standards are far more demanding than the word ''minimum'' would suggest. As a rule, they reflect the interests, opinions, and biases of two groups: professional ''experts'' who think that the consumer ought to be forced by law, if necessary, to set aside other wants in favor of what the experts define as minimum goods and services; and property owners who use minimum standards as a device for maintaining or even raising property values, for excluding ''undesirables'' from a community, or for keeping tax rates down by discouraging settlement of people whose children would necessitate expansion of schools.[30]

To preserve a greater freedom of choice, particularly for the older, fixed-income renter and homeowner as well as for those struggling to save for future education and family needs, is a principle that has too often been lost in recent years.

The use of the police power, to which housing codes are universally attached, is keyed to long-established judicial precedents that reflect slowly changing belief patterns about health, safety, and morals. A minimum housing code should incorporate the available scientific knowledge of health, safety, and morals relating to housing, but it cannot and should not extend very far beyond the established judicial precedents. Otherwise the uncertainty of judicial support reduces vigorous and straightforward administrative processes. A code that is very far beyond established patterns is more likely to develop consternation and antagonism than citizen support. Any code that proceeds substantially beyond these conditions must be justified on essentially economic, aesthetic, and political grounds.

Urban renewal, the catalyst responsible for the mushrooming of housing codes, is itself a kind of zoning. It classifies areas into those that are beyond redemption (demolition), those that need extensive rehabilitation, and those that are to be conserved. Urban renewal imposes nominal national standards—not clearly evidenced in Congressional legislation—over a heterogeneity of local jurisdictional differentials. The result is chaotic and opens the door to forced national uniformity.

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[29] Joseph Guandolo, ''Housing Codes in Urban Renewal,'' *George Washington Law Review*, vol. 25 (October 1956), p. 42.

[30] Edward C. Banfield & Morton Grodzins, *Government and Housing in Metropolitan Areas*, (McGraw-Hill Book Co. 1958), p. 78.

As areas are bounded and labeled, a housing code—generally more restrictive than the municipal housing code—is imposed upon the designated areas. The classification system has resulted in the practice of enforcing the city's "uniform" housing code in the different categories with varying degrees of severity. (It is not uncommon to find in recently enacted codes that provision for clearance of enforcement projects has been made with urban renewal or redevelopment officials before action is to take place or that some kind of cooperation between urban renewal and the housing code administration has been required.)

The courts have supported urban renewal-sponsored code differentials. The Kansas Supreme Court upheld the Kansas City Urban Renewal plan that contained standards and controls for rehabilitation of property in an urban renewal project area that were more restrictive than the minimum housing standards for the whole city.[31] The plaintiffs had contended that only the city could plan compulsory rehabilitation and fix minimum standards, but the court held that the city, approving the Urban Renewal program, had in effect made these standards acts of the city and that the Urban Renewal Plan was therefore binding and valid.

The constitutional question of "equal protection of the laws," raised whenever zoned housing codes are discussed, seems not to have been raised.

The achievement of higher standards through eminent domain has long been recognized and supported by the courts. An interesting variation on this is the reported Society Hill project in Philadelphia, where owners were required to bring their buildings to a standard more restrictive than the city code or face legal condemnation proceedings. As the author notes, "Their position was, however, much different from that of the owner in violation of a local code in that the threat of eminent domain, not the police power, was used to bring about this compliance. Moreover, it is not certain that the courts would uphold such a use of eminent domain in other situations."[32]

In Baltimore, a type of zoned code was used for rehabilitation of the Harlem Park area when the City Council passed additional code provisions not applicable to the rest of the city.[33]

Urban renewal not only makes higher or different standards in selected areas but also changes enforcement policies in areas marked for demolition. If the housing code should be enforced nonselectively in areas slated for demolition, thousands of dollars would be added to the price paid by the city. On the other hand, some owners delay expensive rehabilitation work for fear that there will not be adequate reimbursement.[34] The small owner seems most fearful; the time lag between announcement of an urban renewal area and the landtaking sometimes results in loss of tenants and income. As one owner stated:

> Since I am in an urban renewal area, I just won't do anything major; only necessary improvements. If there wasn't urban renewal coming, I think I would probably re-side the house. It sure needs it, and I'd put in

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[31] *Argentine Citizens Committee* v. *Urban Renewal Agency*, 399 P 2d553 (Kansas, 1965): "We must conclude that an urban renewal agency may include standards and controls for rehabilitation of properties in an urban renewal plan and when approved by the governing body of the municipality as provided by K.S.A. 17-4747 they become applicable to the property covered by the plan and are controlling" (p. 555).

[32] William C. Grigsby, *Housing Markets & Public Policy*, 1963. Footnote on page 310. Phila. U. Press.

[33] M. Carter McFarland, *Residential Rehabilitation in the Harlem Park Area, Baltimore, Md.*, 1962. (Prepared and published under joint sponsorship of FHA & URA & Baltimore Urban Renewal and Housing Agency)

[34] One experienced code administrator states "Along this same line I have observed where there is perhaps a rumor that there would be some urban development and as a consequence the entire neighborhood deteriorated rapidly since no one felt justified in making any expenditures. Conditions in the community change rapidly and I feel that to cover the problems of enforcement could best be handled through administrative policy rather than through pre-designated enforcement areas." Personal letter to author from Albert L. Klatte, Director, Bureau of Environmental Sanitation, Marion County, Indiana.

> central heating. It seems to improve the quality of the tenancy.[35]

The fact that the parcel in question was not in an area chosen for urban renewal emphasizes the prevalence of ignorance about urban renewal policies and projects.

Obviously, urban renewal has profound effects upon housing code enforcement. Different standards are used in hopes that upgrading will conserve an area or rehabilitate it. Relaxation occurs when enforcement would appreciably add to the city's expenditures in eminent domain takings. The more recent concentrated code enforcement (Section 117) in selected areas, with Federal help, can be viewed as an area selection approaching the principle of a zoned code. The fact that all services are to be upgraded in these areas underscores the differentiation of one intracity area from another.

Some codes have tried to recognize the urban renewal facts of life through making explicit provisions in the housing code. The common designation of ''enforcement area'' is a tacit recognition that the code will not be activated in all parts of the city at one time.[36]

A few cities have incorporated a section requiring submission of rehabilitation area boundaries to the city council and selected public officials. This must be done before systematic rehabilitation efforts are undertaken in the area. A public official can delay systematic rehabilitation within portions of the area by notifying the city council, telling them the designated boundaries of the portions he wishes excluded, and declaring that such portion ''is to be or has been acquired for a specified public purpose,'' and that the public interest would best be served by refraining from rehabilitation efforts therein.[37] The director of health (enforcement agency) is directed not to proceed with efforts in the proposed area until the city council adopts a resolution authorizing him to do so, setting forth the following information:

> (a) A designation of the numbered sections and subsections of this chapter (housing code) which the city council resolves shall not be enforced in each such particular portion of a proposed rehabilitation area; and
>
> (b) A designation of the length of the time period during which the city council resolves that such numbered sections and subsections of this chapter shall not be enforced in each such particular portion of a proposed rehabilitation area.[38]

Although the health director may, of course, still declare nuisances, this type of provision is a confusion of responsibility and an attempt at denial of the expert discretion of the health administrator in favor of political considerations.

In another code, provision is made for the forwarding of all notices and findings to the housing director, and no order of the board of health (enforcement agency) shall be in conflict with any order of the housing commission for any developed area or redevelopment plan adopted by the housing commission. In ''blighted'' areas, housing inspectors are to take no further action without notifying the housing commission, and if in conflict, they are not to proceed without the express approval of the board of health.[39] This confuses the responsibilities of two administrative agencies.

In a memorandum on the subject of ''Zoned Housing Code,'' the assistant director for the Minimum Housing Standards Division in Dade County's newly created ''Little HUD'' notes:

> Dade County has recently taken two basic steps to establish variable standards by districts. The Minimum Housing Standards Ordinance for

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[35] George Sternlieb, *The Tenement Landlord*, p. 167. 1966, New Brunswick, N.J., Urban Studies Center, Rutgers State University.

[36] The Cumberland, Maryland, Housing Code is even more explicit when it states that application and enforcement of the code shall be activated only within ''problem areas'' delineated by the health officer to be based on survey procedures of the state health department.

[37] Sioux City, Iowa, Minimum Housing Code, (1961), ord, No. A-12239, sec. 156.14.

[38] Ibid., sec. 156.14.3.

[39] Canton, Ohio, Min. Housing Standards, (1958), ch. III, sec. 1.

Dade County (Ord. No. 63-30) establishes uniform minimum standards for all Dade County. Standards which vary from this basic ordinance have been established as follows:

1) Adoption of County Ordinance No. 68-14, Metropolitan Dade County Minimum Standards Ordinance for the City of Miami.
2) Adoption of the Systematic Inspection Program for the City of Miami, and the four categories for enforcement. (County Resolution No. R-273-68).

The variable standards established by the above legislation is based on the principle of ''Zoned Housing Codes.'' Ordinance 68-14 is applicable only to the City of Miami, and contains higher standards than the Minimum Standards Ordinance for Dade County. The four categories for enforcement established under the Systematic Inspection Program for the City of Miami, designates districts of the City for enforcement at variable times, and exempts pending renewal areas from violations not directly related to the health, safety and welfare of the occupants.[40]

The Dade County approach recognizes not only differentials in areas but also differentials within the code as being *more* or *less* related to health and safety.

Zoning is an accepted part of American government; urban renewal is also, and the minimum housing code has taken its place along with them. That there needs to be related and coordinated action among all three is not arguable: it is one of the few areas of agreement between critics and practitioners in the various fields. A zoned housing code, tied to the workable program and community zoning, could be an agent of coordination that might help eliminate some of the friction now found among agencies, officials, and the public.

The development of a workable minimum standard housing code would provide a basis against which a ''zoned'' program could be developed. This problem can perhaps best be explained through example. Suppose a city or county developed a program for coordinated sequential removal projects, designated areas for rehabilitation—with or without clearance of interspersed buildings—and established other areas as conservation for an indeterminate time. Areas marked for demolition within a year, or possibly two, should not be burdened with requirements much above nuisance standards. Such areas can be considered ''basic code'' units. For areas marked 3 to 5 years before demolition, a somewhat heavier investment can possibly be warranted. This can be ''basic II'' area. Areas marked for 6 to 10 years can be ''basic III''; but areas classified for long-term rehabilitation can be ''full-code enforcement'' zoned, a category attainable only with recognition that imposed costs must be related to economic utility. The simple ''police power'' approach is to be balanced by the same principles governing elimination of substandard buildings in urban renewal projects: eminent domain.

The zoned approach is further developed in chapter 3 on policy and rule making.

In considering a ''zoned'' program, a recent report of a British Ministry of Housing advisory committee may be given prominence.[41] The committee, noting the need for improvements of dwellings that must stand for some time and yet are not worth bringing up to the full standard, suggested two additional categories of improvement, a 3-point and a 5-point standard, that would extract from the 12-point ''full improvement'' standard the elements that are most essential. The three-point scale would use the requirement of a sink with hot and cold water, a water closet, and an adequate ventilated provision for storage of food. The middle scale would add to these a fixed bath or shower and a hand wash basin. Which category is appropriate to use would depend on the condition of the houses, space available in the houses for improvements, and any planning proposals. Government improvement grants, already in effect for the full improvement standard, would be available for the two reduced scales.

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[40] Memorandum from Joseph R. Noffo, June 5, 1968, Dade County Department of Housing and Urban Dev., Minimum Housing Standards Div.

[41] *Our Older Homes: A Call For Action*, Report of the Subcommittee on Standards of Housing Fitness, Ministry of Housing and Local Government; London 1966.

> ...local authorities ought to make a much more comprehensive approach to the housing problems of their areas. They should be required to review the condition of all the houses in their districts and draw up plans for different types of area action-clearance (and where appropriate ''patching''); minimum improvement to the 3 or 5 point scale as appropriate; and full improvement. We think that the definition of suitable areas for treatment of one kind or another is the only way to make action administratively practicable and to allow sensible decisions to be taken about priorities.[42]

The committee notes that designation of full improvement areas will take into account the condition of the houses, prospects for improving the environment if necessary, and any planning proposals that restrict the life of the houses. They also recognize that there will be houses in different categories in the same area and that:

> In every instance what is important is the capacity of the house for improvement. How much work is worth doing to renovate its fabric and provide satisfactory amenities? We do not think that ''life'' is the sole test to apply here. It is an artificial concept. But some notion of the length of time for which a house will remain in use is essential in deciding what action to take on it.[43]

The theory of a three-scale system that takes into account economic and structural feasibility and government redevelopment and clearance plans is a much more realistic method of handling similar situations in American cities than our present uniform enforcement of escalating minimum standards, regardless of cost factors, feasibility, and the projected life of the dwelling. Public interest is better served by the protection of the existing stock of habitable dwellings through a realistic appraisal of their possible improvement than through enforcement of standards, confiscatory in the absence of adequate reimbursement, that lead to abandonment or withdrawal from the rental market—especially in the face of shortage of low-income housing.

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[42] Ibid. par. 72, p. 29.

[43] Ibid. par. 76, p. 30.

Chapter 2

LOCAL CODE ADMINISTRATION - PART II

The contemporary housing code differs from the earlier tenement house legislation in a number of respects. It is directed at restraint over a much wider spectrum of habitable units. Yet the extent of the spectrum is variable, and this lack of standardization limits generalization. The code also covers more of the immediate environment than earlier ordinances were likely to do. This environmental extension involves relatively high dependence upon health and sanitation expertness.

In no state does a ''housing code'' exclusively cover all human habitation. Significant categories are subject to other regulative controls, which are of two types: (1) conditions imposed by state and Federal governments[1] and (2) conditions imposed by local agencies such as health, building, safety, fire prevention, and police regulation.

For practical purposes, the generalization can be made that both central government and other local agency controls are older in time and more specialized in effect. A housing code is something of a catchall for permanent-type housing not otherwise regulated and supplants rather than supersedes most preexisting regulative controls.

Some housing is not clearly subject to occupancy and use standards. Increasing mobility of people, particularly migrant workers, conservation and forest workers, and houseboat owners, have created problems for which there is little systematic regulation.[2]

Scope as to Structure Coverage

Public antipathy to invasion of privacy and home has limited the applicability of the code in some jurisdictions. The housing code of Glen Cove, New York, does not apply to owner-occupied homes;[3] Little Rock, Ark., exempts single-family dwellings occupied by one family from most space and use requirements.[4] Where enforcement is a touchy area—as in the Midwest—housing code operations have occasionally had to delay systematic inspections until public support was assured.[5] Politics and availability of support will dictate both what the code regulates and the climate of enforcement.

On the other hand, an all-inclusive scope of coverage is not uncommon, such as the Dade County provisions:

> Every portion of a building or premises used or intended to be used for any dwelling purpose, except temporary housing in time of local emergency, disaster or necessity, shall comply with the provisions of this article....[6]

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[1] For example, programs that receive Federal subsidy such as: hospitals, nursing homes, specialized and general public housing, and those subject to special state law such as most hospitals and prisons.

[2] Migrant labor camps are often subject to special regulation, as in Florida (Fla. Stat. 381.422). In New York State this subject is undergoing considerable study.

[3] Glen Cove Housing Code (1965), 1.4.

[4] Building Code Part IV: Housing, Little Rock, Ark. 1963, sec. 306.6.

[5] Letter to author from Health Director, Sioux City, Iowa.

[6] Metropolitan Dade County Min. Housing Standards ord. #63-30, sec. 1.04.

The retroactive character of the housing code as it applies to all existing dwellings has been a source of difficulty. Even today some cities cannot get approval of a code applying to all dwellings.[7]

Where challenges have been raised about the constitutionality of codes regulating buildings that complied with previous regulations, the courts have generally upheld the codes in line with the Supreme Court ruling in the 1946 *Queenside Hills* case:

> in no case does the owner of property acquire immunity against the exercise of the police power because he constructed it (the dwelling) in full compliance with existing laws.[8]

In this case the cost of meeting the code was equal to almost one-third of the building's investment value. A more recent case involving the replacement of glass doors with fireproof doors--also expensive--upheld the principle of the *Queenside* case and noted.

> The question in these cases is whether the public welfare demands retroactive application and whether the property owners affected suffer unreasonable exactions as compared with the resulting benefits. The public has a right to the safest method of protection from fire which can be found and a municipality has the duty to provide such protection...the testimony of the witnesses here and the findings of the trial judge as expressed in his opinion show that glass doors as a secondary means of exit are not as safe as a direct means of exit. We think it is clear that in view of this evidence and finding a reasonable basis exists for the determination by the city Council that the public safety required application of this ordinance to existing buildings. The only remaining question, therefore, is whether the burden upon the property owners is so great compared to the public benefit that the ordinance must be held invalid. No hard and fast rules can be laid down in such cases...[9]

Where the issue is a clear-cut one of safety from fire, the decision of the court is not difficult to reach under the police power. But where the issue is one that is less easily proved as detrimental to health or safety, the ruling is open to doubt. A recent court decision refused to uphold the requirements of private bathroom facilities as a constitutional exercise of the police power. The court concluded that

> to hold otherwise would be to permit the compulsive improvement of any real property merely upon a legislative finding that the improvement is required to promote the public health, safety or morals, rather than upon a factual determination that the continued use of the property without improvement immediately or directly imperils the public health, safety or morals.[10]

The older housing code was apt to apply only to occupied dwellings. Problems with vacant dwellings were handled under nuisance abatement. The more recent codes, however, are apt to apply to vacant dwellings as well as occupied ones.[11] There is reason for this extension of the code, since vacant houses, even boarded-up, can contribute to blight and deterioration of neighborhoods. They can become havens for vagrants, juveniles, and vandals. The Islip, N.Y., housing code is applicable only to ''unoccupied or rental premises,'' and the explanation is made that ''unoccupied structures tend to become substandard and a public nuisance...''[12] Thus the undesirability of the vacant house is related more to its potential nuisance characteristics than to its present effect on occupants or the public. For this reason, its inclusion in the category of ''housing'' is open to questions of whether owners of vacant dwellings can be forced to finance heavy expenditure to conform to regulation aimed at habitable units. It is a question that will become more critical as housing jurisdictions enforce these provisions. Allegheny County, Pa., recently extended its housing code to cover vacant dwellings and is enforcing it through fining violators as if the units were inhabited. Owners who repair or demolish have had their fines suspended.[13]

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[7] In 1967, Lincoln, Neb., rejected a referendum that would have replaced the code applying only to dwellings built since its passage in 1956, with one embracing all existing dwellings. (*J. of Housing*, vol. 24, No. 10, (Nov. 1967), p. 559.

[8] *Queenside Hills Realty* v. *Saxl*, 328 U.S. 80 (1946), 83.

[9] *Kaukas* v. *City of Chicago*, 27 Ill. 2d 197, 188 N.E. 2d 700 (1963), 702.

[10] *Gates Co.* v. *Housing Appeals Board of the City of Columbus*, 225 N.E. 2d222 (Ohio, 1967), 225.

[11] Housing Code, Health & Hospital Corp. of Marion County, Ind., 1968; Atlanta, Ga. Housing Code, 1968; Baltimore Housing Code, 1966 ed., has a special chapter XIII concerned with Vacant and Unsafe Buildings, to mention a few examples.

Action on this unoccupied dwelling problem has been spurred by the 1965 Housing and Urban Development Act that authorized HHFA to make two-thirds matching grants toward the cost of demolishing unsound structures. The structures to be demolished must, however, ''constitute a public nuisance and a serious hazard to the public health or welfare.''[14]

Michigan passed an anti-slum law in 1965 that allowed local governments to raze, at owner's expense, dilapidated dwellings that had been uninhabited for 6 months.[15] The Baltimore code goes even further: it provides that ''No partially or completely vacated building shall remain boarded up for a period longer than ninety (90) days.'' After this period, the owners shall rehabilitate or demolish, and the building inspection engineer is to take action at the property owner's expense if the owner refuses.[16] This type of provision illustrates the coordination of housing and building code administrative processes; both codes are enforced in Baltimore by the same agency.

The problem does not end here. For even demolition provisions are dependent upon economics. If the city has too many vacant and abandoned buildings, the funds provided for demolition will quickly disappear. If the value of the lot or its tax-producing potential will not support the cost of demolition in situations in which owner demolition proves impossible, an unresolved problem comes to the surface. Federal funds are limited; many requests from cities are now turned down because of tighter budget provisions for this program. Situations similar to that in Newark—where sometimes 3 years elapse between condemnation and demolition—are appearing elsewhere. The problem of the ''walk-away'' in New York City is assuming large dimensions as landlords find it economically unfeasible to rehabilitate.[17] Abandonments are a major problem in most large old cities of the East. This problem is of crucial concern to code administrators. The Baltimore program coordinator states ''like many similar cities [we] are experiencing severe difficulties with vacant vandalized buildings.''[18] This problem will be further discussed in chapters 4 and 5.

A related situation is the concern over loss of dwelling space when formerly habitable dwellings are left vacant and abandoned. This was voiced in New York State's receivership law, when it noted that the legislative purpose of the law was to eliminate intolerable and unsafe conditions in multiple dwellings and to increase the supply of safe and adequate housing accommodations. While the law was upheld by the New York courts, it may be in point to note a concurring opinion of Judge Van Voorhis:

> ...I do not subscribe to the dicta therein contained to the effect that it is constitutional by this means to require owners of such buildings

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[12] Islip, N.Y. (1965). p. 1

[13] *Journal of Housing*, vol. 24 (November, 1967), pp. 571, 572.

[14] 42 U.S.C. sec. 1467 (Supp. 1965); F.C.A. 42 sec. 1467 (Supp. 1965). Chicago, for example, had a $715,000 Federal grant to demolish abandoned and vacant buildings in 1966 and 1967; as a result, with additional city appropriation, the number of demolitions in the city for 1967 reached some 1,300 buildings. (1968 Budget Message, Dept. of Buildings, Commissioner Sidney D. Smith, November 22, 1967, p. 6).

[15] *Journal of Housing*, vol. 22, No. 7 (July 1965), p. 368.

[16] Baltimore Housing Code, sec. 1304 (c).

[17] An article in the *New York Times*, April 20, 1968, p. 19, quotes a councilman as estimating the number of owner-abandoned buildings in New York City at between 5,000 and 12,000.

[18] Letter to author from Ellsworth J. Andrews, Program Coordinator, June 24, 1968.

> to repair them, not merely for the protection of the occupants, but to increase the supply of housing accommodations. Owners of multiple dwellings may not legally be permitted to utilize them for the purpose of economic gain unless they are rendered sanitary and safe, but this has nothing to do with preventing an owner from demolishing the building at his election or from withholding his property from the rental market.[19]

The problem of the owner's ''right'' to withhold property from the rental market is one that may become more than academic, as vacant structures are brought under the domain of the housing code and its penalties.

MIXED-USE OCCUPANCY

Buildings in which commercial, warehousing, repair shops, and light industry divide space with upstairs or backroom tenants constitutes the ''mixed-use'' building. The commercial and related uses are usually covered by other state and local codes. Some housing codes recognize problems of this type and make some effort to accommodate the protection of people who are occupants of such mixed-use buildings. The Buffalo code, for example, forbids use of buildings handling or storing flammable liquids or toxic gases for dwelling purposes.[20] It also specifies that all new construction, conversions, or additions of nonresidential space shall be separated from residential space ''by approved fire separations of one hour fire resistive rating or more.''[21] Some codes specifically note that they apply to buildings of mixed occupancy and thereby take jurisdiction of all parts of such buildings.[22] Most housing codes seem to be unaware of this problem. The subject is involved with such complex interrelationships, particularly in larger cities, that adequate treatment is beyond the scope of this study.

ROOMING HOUSE AND TRANSIENT HOUSING

Rooming house provisions are found in almost every housing code and are usually separately treated, with different regulations specified, and in many jurisdictions are subject to license requirements.

This is related to the historical need to have police and public health control over transients to preserve the health and safety of the public at large. ''Flophouses'' were among the earliest habitable units to be regulated locally. A provision found in many codes that the operator shall report to the health commissioner within 24 hours the name of any person suspected of having a communicable disease[23] illustrates the specialized problems of housing for transients. It also supports the recognition that housing codes must be coordinated with health department function.

Rooming houses cater to a varied clientele, ranging from the one- or two-night stand of the vagrant to the more permanent residence of the oldster who does not wish to be responsible for maintenance and upkeep of his domicile. Predominantly, the occupants of single rooms as relatively permanent residents are poor and often old. They have, as a class, restricted and inelastic income. The rooming unit classification can by law be restricted to adults only, who are presumptively experienced in caring for themselves. Many do not have resources to eat out nor to rent full residential quarters with rentals that cover capital costs, depreciation, upkeep, the replacement of full bathroom and kitchen facilities. (The rooming unit—by definition—is a room(s) forming a single habitable unit used for living and sleeping but not for cooking or eating purposes.)

These are urban located, single adults, with restricted income, who eat breakfast and some other meals in their ''homes'' and some meals outside. Housing codes have not sufficiently considered the problem these people present. The category ''rooming house'' or single rental room consistently excludes all cooking and eating (note definition). This category usually approaches the bathroom issue by a determination of numbers of roomers per bathroom unit, eight per bathroom appearing to be the norm. Some, as in Chicago, go to ten; others, as in Marion County, Ind., limit the number to six.

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[19] In re Department of Buildings of the City of New York, 14 N.Y. 2d291, 200 N.E. 2d432 (1964), concurring opinion, p. 440.

[20] Buffalo Housing and Property Code, ch. XI (1965), sec. 150(a).

[21] Ibid., sec. 144 b.

[22] Binghamton Housing and Property Code, ord. 174, sec. 4A.

[23] Sioux City, Iowa; Dade County, Fla.; and Toledo, Ohio, have such provisions in their codes.

There is no very valid reason, in terms of health, why people who eat ''in'' or ''out'' should or should not cook and eat breakfast in their rooms now that portable and especially open-flame ''hot plates,'' as safety hazards, are no longer the only equipment for such purpose. This is especially true if precautions are taken to ensure adequate electric wiring to support hotplates drawing a predetermined wattage and if gas-cooking units are excluded; and if garbage is contained and collected appropriately. The Milwaukee requirement of increased room size if simple cooking facilities are allowed seems justified as a protective measure.

A recurrent complaint of code enforcement officials relates to the problem of the gap between ''rooming'' and ''dwelling'' categories. Some jurisdictions simply close their official eyes to the fact that poor, often handicapped, old and younger people who are down on their luck but proud keep up appearances and cook simple meals in their rooms. Few, if any, large cities consistently try to enforce the rooming house provisions. The code should be changed to accommodate social and economic factors inherent in contemporary urban culture. The change should not be considered a waiver of standards. It should be a recognition of, and protection for, a struggling class. The use of police restraint is justified only when significant health and safety issues are raised. Basically, codes should be conceived as a means, not of eliminating differentials in living patterns, but of curbing evils that have more substance than conveniences and amenities consistent with dominant majority values.

The Housing and Maintenance Code of New York has approval and recognition of HUD. It outlaws single-room occupancy dwellings by 1977; no reason exists to encourage a private investor to provide dwelling units of this character. But Miss Lillian Zerwick, director of the Amsterdam Social Service Center, estimates that there are 70,000 single-room occupants in the city. Robert G. Hazen, Commissioner of Development in the Housing and Development Administration, is quoted as saying that ''there will always be a need for suitable single-room occupancy housing, but that there is not now a specific Federal financing program that meets this need.''

The collision courses of HUD and HEW is given significance when it is pointed out that Social Service (Public Welfare) recognizes both furnished and unfurnished rooms and allocates rental monies of $82.45 and $65.75 per month for the categories. Social workers find quarters for derelicts who have been living in subways, hallways, movies, and other ''sub-standard'' quarters in ''furnished'' rooms, increasing both the the substandard housing occupants as well as swelling the welfare rolls.

The present code, in New York City, permits up to six tenants per bathroom. Inspectors for the Housing and Development Administration have begun to report violations against landlords who break this rule. David K. Shipler, in a feature article ''Single Room Occupants Face Eviction'' noted that city officials speculated privately that the law would not be enforced, but those affected are not confident of that. He added the comment: ''Social workers and housing experts say there are many of these people who have no place to go. City housing officials say there are no present plans to create furnished-room accommodations for them.''[24]

The inclusion of hotels and motels in the rooming house category,[25] as is common in many codes, shows that the special problems of the rooming house as differentiated from the overnight accommodation offered by the hotel and motel has not been faced.

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[24] *The New York Times*, Nov. 17, 1968, p. 1.

[25] Most rooming house provisions close with a statement similar to the following: ''Every provision of this chapter which applies to rooming houses shall also apply to hotels, except to the extent that any such provision may be found in conflict with the laws of the state of Michigan or with the lawful regulations of any state board or agency.'' (Grand Rapids, Mich. Housing Code, sec. 8-661.)

Clarification of definitions must also take into account dormitories and student rooming facilities. These categories have not usually found a satisfactory base in the classification system of the housing code. In one code, ''hotel'' may be defined as meaning ''inn, hotel, motel, apartment hotel, lodging house, dormitory or place where sleeping or rooming accommodations are furnished for hire...''[26] whereas another code may include in the definition of ''multiple dwelling'' dormitories, fraternity and sorority houses, and clubs.[27] There are long-established practices of students saving money—often an absolute necessity when combining existence and education—by living in ''rooms'' and eating eggs, breakfast cereals, coffee, doughnuts, soup, milk, etc. Housing codes should not hinder education of poor students through inadequately considered definitions.

In the larger jurisdictions definitions can become very complex, so that confusion about what regulation may apply can easily occur. This is exemplified in a 1965 Missouri case. The defendant had been charged with running a rooming house without a permit; the decision in favor of the defendant was in large part based on the definitions of ''rooming house,'' ''dwelling unit,'' and ''light housekeeping unit.'' The fact that the tenants furnished cooking and living facilities did not make the building a rooming house operation, as the judge stated:

> The relationship of landlord and tenant is far different from that of proprietor and roomer or ''paying guest'' as that case makes clear. For as was there said ''...a tenant has the exclusive legal possession of the premises; he and not the landlord being in control and responsible for the care and condition of the premises''.[28]

When a complex division of categories covers essentially similar operations, code administrators must beware of confusing their own inspectors as well as those inspected.

SPECIALIZED HOUSING: NURSING HOMES

The basic economic issues are more deeply buried in the specialized housing-nursing home complex than in the rooming house problem. Governmental subsidies are extended under criteria that are not coordinated with regulative controls. From this perspective, the college dormitory, financed by HUD on a long-term, low-interest, presumably self-liquidating basis, can be considered a transitional category between rooming houses—a category somewhat less attractive to governmental subsidy—and hospitals, which are becoming increasingly dependent upon governmental capital aids.

If nursing homes, convalescent homes, or any other category of ''housing'' facilities that provide care for bedridden and dependent patients are to be regulated they must first be defined. These definitions may include subcategories and differentiation. But the complex must be bounded on one side by critical bed hospitals and on the other by what is today called ''specialized housing.'' Moreover, the definitions of all these clusters are interdependent. Neither popular usage nor existing state-local legislation comes to grips with the problem.

Most states require licensing of nursing and proprietary homes, but the sources of regulations may not always be the health department. New York State exhibits some of the confusion in this area. Up to September 1968, the Health Department and the Social Service Department divided responsibility in proprietary homes that included infirmary facilities. In September, the Health Department took jurisdiction of all homes in this category, as well as ''family-type proprietary homes for adults'' that house from two to five guests, formerly under the Social

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[26] Terre Haute, Ind., code, sec. 1901.13.

[27] Wyandotte, Mich., code, ch. I, A 109.

[28] *City of St. Louis* v. *Brune Management Co., Inc.*, 391 S.W. 2d943 (Mo. Appeals, 1965), p. 947, quoting from *Marden* v. *Badford* 229 No. App. 789, 84 S.W. 2d947, 955.

Services Department. The latter department will retain jurisdiction over homes for the aged that are without infirmary facilities.

In 1967, a series of state legislative committee hearings were held on problems of housing the elderly and the infirm. Conditions that received attention at these hearings included inadequate quarters in second-rate hotels and rooming houses that infirm and elderly persons occupied because of the shortage of nursing homes,[29] rooms lacking minimum sanitation and safety standards, and the problems accompanying the use of hotplates in hotel rooms and rooming units. A bill was later introduced by State Senator Lent amending the Social Services Law in relation to residences for adults and facilities for the aged. Passed into law, and taking effect April 1, 1969, it adds to those categories subject to the rules of the board and regulations of the department a ''residence for adults,'' defined as:

> a facility other than a nursing home, convalescent home, home for adults, home for the aged or aged care accommodation which holds itself out, advertises or otherwise in any manner or form represents itself as providing living quarters, central dining, and housekeeping services to adult persons who, because of age or disability, require lodging, board and housekeeping services on a continuing basis.[30]

This brings under standards and certification requirements of the Department of Social Services the home or institution that provides both central dining and housekeeping services—in other words, boarding or lodging houses for old people.

Legislation as described presumably takes priority over provisions of local housing codes. There has been no evidence of an attempt to coordinate direct legislative and local housing code regulatory systems. This both creates confusion among housing code administration, health, and social services and leaves possible gaps and duplications. Administratively, this means parallel inspectional systems as well as systems of possible remedies.

Local codes often make additional requirements for such specialized housing. But the confusion between state and local regulation is perhaps illustrated by the insertion into a local housing code of the following:

> insofar as other city ordinances and/or state statutes or codes do not establish rules of regulation and operation, this ordinance shall apply to nursing and convalescent homes, motels and hotels.[31]

In some jurisdictions, especially those where codes are enforced by the health department, the housing code includes a special set of provisions for nursing homes. Sioux City, Iowa, for example, has a section dealing with ''fitness of operator and supervisor,'' and stating that the nursing home shall be in compliance with state standards.[32]

''Housing,'' as the word is used in housing codes, is not without difficulty as establishing a useful category for regulative purposes. It simply lacks definitive scope. Lacking precision, a housing code can be made a tool for varied and special purposes. Such codes are expanding in scope, and as they expand they get farther and farther from their health departmental sponsorship and as such must rely upon criteria other than the health science foundation of public health administration. Increasingly housing codes are tools being used to aid the accomplishments of urban renewal. This is not primarily a health objective; it is a composite in which economic,aesthetic, and social factors are associated to keep cities from disaster. Good sense requires that criteria to accomplish such purposes, laudable as they are, should be found in democratic concensus and humanitarian good will. When housing codes are made tools for this purpose, it is no longer competent to make out that their purpose is health, even when this term is given broad connotations.

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[29] *The New York Times*, September 21, 1967.

[30] Session Laws of New York State introduced as Senate Act 4358-A on February 22, 1968.

[31] Hamilton, Ohio, Housing Code, ord. No. 6318-1961, Part I, sec. 514.04.

[32] Minimum Housing Code of Sioux City, Iowa, sec. 156.11.

This perspective clearly motivated Mr. Justice Clark in his dissent in supporting the argument that inspections should be freely made without the necessity of search warrants:

> Inspections also play a vital role in urban redevelopment and slum clearance. Statistics indicate that slums constitute 20 percent of the residential area of the average American city, still they produce 35% of the fires, 45% of the major crimes, and 50% of the disease.[33]

We should remember the admonition of Mr. Justice Douglas in Berman v. Parker:

> Miserable and disreputable housing conditions may do no more than spread disease and crime and immorality. They may also suffocate the spirit by reducing those who live there to the status of cattle. They may indeed make living an almost insufferable burden.[34]

A second and earlier evidenced trend through which housing code administration was disassociated from health gave focus to its use to expand the scope of physical structure regulation. This trend is given emphasis in the large number of jurisdictions that have put housing code administration in building code regulative systems, or combined the two under administrators whose experience is primarily with construction, reconstruction, and demolition. This movement has, like the identification of housing code administration with urban renewal programs, facilitated emphasis upon landlord responsibilities and emphasized reliance upon police-type inspections and prosecutions. The consolidation of housing and building code administration has been given impetus through the quasi-private and relatively independent national and regional code organizations. Basically, both trends are part of the bumbling efforts to attack ''poverty,'' and secondarily to improve health standards.

It cannot be questioned that a change in locus of administrative base for housing code administration changes its emphasis as a tool. The expansion of the scope of such codes, under political pressure to accomplish various purposes, has taken them further and further away from health departmental expertise. These changes, however, do not eliminate or reduce the province in which health-science expertness contributes, or can contribute, to community well-being.

Implied in nearly every housing code is the assumption that it is designed to apply to housing for ''normal people.'' But society is not made up only of normal people. A substantial gap appears between housing designed for and used by normal people, and housing needs, associated with other needs, of people who are not well. Federal programs, in cooperation with states, have evolved unstable standards for housing facilities and resources into which unwell people can be put and receive Medicare and welfare subsidies. The same generalizations can be made for hospitals. Local standards are extended in some instances, but usually outside of housing codes; these focus upon housing for normal families.

The gap is becoming more noticeable as the nursing home standards become clearer. Not one housing code has been found that carefully approaches and provides definitive standards for covering this gap. The assumption must be made that other regulative programs cover the spectrum, although such evidence as has been discovered in this study makes generalizations impossible. A spectrum of housing problems seems to lie between housing for normal families and facilities for the bedridden. ''Specialized housing'' is a term now in common use. It is as inexact as the term ''housing'' in housing codes. Who makes and what are the standards for orphanages, juvenile detention and other homes, reformatories, poorhouses, jails, and other long-established specialized housing? Are these properly within or outside housing codes? How do housing code standards affect these units?

In every one of these categories some important aspect of public health controls exists. But a more limited use of ''specialized housing'' gives sharper meaning to the limitations of housing codes as instruments of effective standard-setting entities. Many persons are unwell in the sense they need care and attention not easily provided in housing designed for well people. They do not need, nor can they afford, increasing costs of nursing homes that meet Medicare and welfare standards. The gap is present in both public and private housing resources. Who sets standards with realistic perspectives relating to economic facts for those in need of respite from the intensities of life? Certainly there should be alternatives other than hospitals and nursing homes. Facilities for the aged and for the handicapped cannot be considered as one category. A spectrum must be found if needs for varying degrees of decline and competence are to be reckoned with in a culture in which standard housing does not provide places for ''extended'' families. The lame and the blind create special housing problems, for themselves and their families, as public transportation declines and disappears. Increasing numbers of those in their golden years simply vegetate while awaiting the end; they do not require the same facilities as those recuperating from surgery. The more the problem is examined, the greater the subclassifications and the need to combine economic and health factors. Examination of housing codes gives little realization that these elements are part of our time and of all of our cities and suburbs.

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[33] *Camara v. City of San Francisco.*

[34] *Berman v. Parker,* 348 U.S. 26, 32 (1954).

There is good reason to use housing codes for other than health-science ends. Political thrust will shift emphasis at different times and in different places, but the hard core of health-related problems will increase rather than diminish. The problems presented are beyond resolution in this study. They need action-oriented further study that is related both to health and environment as part of larger perspectives. This need is desperate.

The capacity of state-local governmental definitions competently to meet the specificity necessary for penalty exactions is seriously limited by Federal loan, grant, and workable program requirements; some in HUD and some in HEW and still others in V.A. Nor can the issue be bypassed if uniformity in application of Federal policies is to be considered a major factor.

The basic definitions in this cluster of dwelling units should be made by the Federal Government. Because two departments and one ''administration'' are involved, the definition pattern ought to accommodate the interests of all three. It should, moreover, be made with full understanding of the dynamic nature of circumstances. Both the technological and changing cultural value elements are unstable; definitions should seek equilibrium with appendaged notice of processes, conditions governing time periods, and involvement of field administrative voices in the enterprise of making and remaking definitions.

What is needed is more than a definition pattern; a process to accommodate change and involve state, local, and at least three Federal agencies is indicated. When the process provides definitions and regular reappraisal determination on a time schedule, it will become possible to combine conditional subsidies with state and local service delivery systems. Until these conditions are brought about, the Federal subsidy programs and local code administration will continue in confusion.

Housing codes have traditionally shown concern for external conditions that appear to relate directly to fire, safety, and health hazards, so that clearing lawns and premises of rodent harborages, filth, rubbish, and combustible materials was clearly related to maintenance of sanitation and safety in the dwelling and its immediate premises. The contemporary code is reaching out to embrace more of the environment, including elements formerly considered to be within the province of zoning.

Environmental Extension

Binghamton, New York, amended its Minimum Standards Housing Code in 1965 to ''Housing and Property Maintenance Code.'' Its scope was extended to cover not only dwellings but also commercial, industrial, and storage buildings. Prohibitions against storage of junked vehicles and against undue blowing of dust on vacant lots are included.[35] The 1965 Housing and Property Code of Buffalo, N.Y., prohibits artificial lighting where it interferes with the "sleep, comfort, health or repose of persons residing in the vicinity."[36] Coping with problems of vacant lots--especially since the increase in demolitions has multiplied the number of vacant lots—has prompted amendments that "cleanliness of the dwelling" includes cleanliness of adjacent lots, whether owned by the dwelling owner or by other persons.[37] Another code defines "premises" as including "any lot or piece of land inclusive of the buildings and shall include parking lots, tourist camps, airports, junk yards or other places or enclosures however owned or occupied."[38]

The inclusion of provisions on "nondwellings" in recent codes indicates the extension of regulation to structures not used for habitation. To some extent, fence repair, rodent harborages, etc., have always been of concern to health inspectors, for they were directly related to physical well-being. But the maintenance and painting of nondwelling structures can only with great difficulty be related to health or safety.

When the housing code, promulgated to eradicate slums, blight, and deteriorating neighborhoods, has failed to accomplish its mission, regulation will inevitably spread outward to embrace more of the environmental factors. Most contemporary literature on the housing problem recognizes that the housing unit is only one among many causes that result in blighted neighborhoods. Lack of open space, business and auto traffic congestion, dirty streets, and lack of recreational facilities are only some of the contributing factors. It is well known that owners of property in rundown neighborhoods are unwilling to spend to improve their parcels; the added investment would in all likelihood bring no return. As a result the insidious process of decay moves ever onward; a little environmental blight breeds more, and this in turn spreads outward to the area nearby, and in such an environment, the housing code can have practically no outward visible effects. We see recognition of this fact in recent trends toward a more inclusive coverage of the housing code itself, and in some Federal programs Federal assistance in code enforcement, under Section 117 of the 1965 Housing Act, is geared to rehabilitation of the whole neighborhood and requires that public facilities be brought to a good condition of maintenance at the same time that private properties are rehabilitated.

How are codes attempting to deal with this obvious interdependence of housing and environment?

When an attempt is made to evaluate either the life expectancy of a building or the value of a reconditioned building in the future, the elements of adjacent or neighborhood values become critical. The house obviously cannot be separated from its environment. Some codes are therefore extending regulations dealing with dwellings to commercial and other structures. The Atlanta housing code has included in those dwellings and buildings that are subject to being labeled "unfit for human habitation" "commercial, industrial or business buildings located in or situated contiguous to residential areas which detrimentally affect environmental conditions therein..."[39]

The Trinidad code enforcement program in Washington, D.C., resulted in the Housing Division's appraising commercial structures as well as dwellings. At least one housing code has included in its designation of "unfit" dwellings and its procedure for legal condemnation the following defect: "Those, which, because of their dilapidated, decayed, unsafe, unsanitary or such other condition which tend to lower the property values of the adjoining properties or of the neighborhood."[40] The element of economic values is traditionally associated with zoning, not with housing codes.

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[35] Ordinance No. 174, sec. 4-A: ord. No. 175, sec. 7.11(c).

[36] Sec. 130, Buffalo Housing and Property Code.

[37] Kalamazoo, Michigan, ord. #708, sec. 711 (1965).

[38] Grand Rapids, Michigan, Housing Regulations, ch. 135, 8.563. (21) (1965).

[39] Atlanta, Ga. Housing Code, article III, sec. 15-44 (a), (1968).

[40] Grand Rapids Housing Code, sec. 8.672. (8).

In some codes, there is more than prohibition of unwanted conditions in the environment. Requirements tied to ''attractive'' maintenance of dwellings, structures, and yards are beginning to appear. Madison, Wisconsin, for example, lists among the maintenance duties of the owner:

> Landscaping, planting and other decorative surface treatments shall be installed if necessary and maintained to present an attractive appearance in all court and yard areas. Plantings shall be maintained so as not to present hazards to adjoining properties or to persons or vehicles traveling on public ways and shall be maintained so as to enhance the appearance and value of the neighborhood and city.[41]

While the intent of such a provision is laudable, there is a potential danger that should be recognized. The difficulty of assigning penalties based on police power for infringements that are difficult to assess on principles other than aesthetic and that are based on personal judgments about what constitutes ''attractive,'' ''enhance,'' etc., is almost beyond imagination. There is also a problem recognized by Banfield and Grodzins when they stated that minimum standards cannot be justified unless they are designed to avoid a clear danger to the whole community and that ''to require the consumer to buy more housing or related facilities than he wants is both an infringement of his liberty and a malallocation of resources.''[42] What is essential should not be confused with what the middle class finds desirable. This appears to be a recurrent trouble as codes are expanded and escalated to a point inconsistent with the freedom generally associated with American democratic ideals.

Milwaukee recently enacted regulations that lawns must be cut and cared for.[43] In view of the practical difficulties in enforcing such a provision, the code administration was careful to point out the problems such a regulation would entail. But the measure was passed. Now the code administration only hopes that the owner, at liberty to escape the requirement through putting concrete or asphalt in place of grass, will not be pushed into this drastic step through failure of tenants to keep up lawns. If this happens, however, and too much soil area is replaced by solid, imporous material, the real health problems posed by over-loaded sewers and runoff would be far more serious than unsightly, uncut lawns. All too often legislators fail to assess adequately the expert's knowledge of consequences when they try to appease some of the more demanding voices of their constituents. In attempting to resolve the problems of the total house environment, all the elements involved must be fully considered.

Although some places are incorporating elements of zoning codes, and other regulations, such as anti-litter provisions, prohibitions against noxious weeds, etc., into their codes, the traditional method of dealing with these external blighting conditions has been through the nuisance concept. The New Britain Sanitary Code treats nuisance as follows:

> No owner, tenant or occupant shall cause or permit the accumulation, or place upon any street or sidewalk, in any building, outhouse, yard or enclosure any dung, filth, stable bedding, poison ivy growth, ragweed, goldenrod, offal, decaying vegetables, meat or fish, animal matter, dead animal, loose or waste paper, wash, dirty water, brine or rubbish of any kind which shall become

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[41] Madison, Wisc., Housing and Property Maintenance Code, ord. #1857, ch. 27, sec. 27.05 (1965).

[42] Edward C. Banfield and Morton Grodzins, *Government and Housing in Metropolitan Areas*, N.Y. (McGraw-Hill Book Co. 1958), p. 79.

[43] This type of provision is appearing more frequently in recent codes, often under responsibilities of owners relating to the maintenance of nondwelling structures, fences and premises. (Sioux City, Iowa Sec. 156.12.)

> offensive, unwholesome, or shall endanger the health or well-being of any person.[44]

As our cities have become deluged with paper material, glass bottles, and cans, anti-litter ordinances have multiplied. They are sometimes part of the Sanitary Code, and are sometimes separate municipal ordinances. Such codes establish means by which the city may act to clear vacant private property of litter, after due notice and time for compliance have been given. Most of these codes attach penalties to the act of littering, as well as to the failure to maintain property free of litter, and yet practically, it is the owner of the property who will be held responsible and be subject to fine or imprisonment, or both, for a misdemeanor.

Similar codes may include regulations in burning and incineration of rubbish and garbage, and control of weeds. Increasing numbers of abandoned appliances and automobiles have resulted in still other regulations, sometimes tied to health and sometimes to zoning. Anti-blight ordinances often cover these areas and the parking and storage of vehicles. One such anti-blight ordinance prohibits the existence of any structure so deteriorated it no longer serves the purpose for which it was intended.[45]

Regulations on the foregoing subjects may be found in housing codes, zoning codes, sanitary codes, ''dangerous building'' codes, and other ordinances. Confusion can result when a ''minimum standards housing code'' regulates environmental conditions; yet housing conditions are so closely related to the surrounding environment that, unless there is concurrent interest in enforcement of all related regulations, housing code enforcement cannot succeed in its attack on blight.

A recent article, aptly entitled ''Housing Code Enforcement, Single-Handed, Can't Improve Neighborhood Living Environment,'' stresses the need for coordination of all codes and ordinances to make the term ''systematic code enforcement'' meaningful. The author states:

> We now know that safe and sanitary housing cannot be maintained in a good condition unless the total housing environment is maintained in a good condition. ...We know that the housing code, as important as it is in maintaining structural and healthful occupancy, is only one of the many tools available to cities. We know that, until the cities are willing and able to enforce an air pollution code, impound old cars, enforce off-street parking requirements, arrest litterbugs, plant and maintain street trees, stop hot rodders, enforce zoning ordinances, repair the streets, improve and maintain sidewalks, install sewers and storm drains, eliminate rodents and their harborages, provide social services, treat the mentally ill, and assist the retarded—we know that, until this is done, cities will continue to deteriorate.[46]

Needless to say, it is a tall order, and one not likely to see fulfillment in our time. But a beginning could be made; and perhaps what is needed is a better means of coordinating some of these matters. The conclusion seems obvious that either the concept of housing code should be expanded—a practice not recommended without significant modification in titles—or a neighborhood environmental code developed.

It is not a simple matter to determine the metes and bounds of environment relating to a particular house or neighborhood. The Howard County Housing Code (Maryland) illustrates what might be called a step in the direction of the development of a basic environmental housing code. Conceptually this frame of reference is different from the more conventional housing codes designed, consciously or unconsciously, for application in urban centers with accumulations of older buildings. Howard County is largely rural at present. Such areas are less likely to have developed the full panoply of regulative controls into which housing codes can be put.

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[44] New Britain, Conn., Sanitary Code, sec. 20.

[45] Hamtramck, Michigan, and Ypsilanti Township, Michigan, have such ordinances.

[46] Lester J. Gillis, in the *Journal of Housing*, No. 11, December 1967, p. 628.

The following provisions can be considered something of a code within a code. It seeks to establish the bare minimum conditions, but with language permissive of expansion as acceptance of higher standards becomes politically viable. It is pointed to judicial responsibilities in sharpening definitions because it seeks to expand and clarify nuisance-like conditions. In our traditions such definitions are the province of judicial rather than legislative finality. Use of provisions in the performance-type manner more clearly settles responsibility on courts. Such provisions also create inescapable burdens for rule making as a clearly developed administrative function. Duties, rights, and obligations must be clarified to the point of ''specification'' before they can be fairly enforced. The performance-type provisions do, however, provide a solid base for minimum standards and subject scope. They lend themselves to educational programs and extension of community responsibilities and as such provide foundation for representative rule-making processes.

What might be called the ''basic'' code within a code in Howard County is as follows:

> The following shall be defined as nuisances:
>
> 1. Any public nuisance known as common law or in equity jurisdiction.
> 2. Any attractive nuisance which may prove hazardous to children whether in a building, on the premises of a building, or upon unoccupied lot. This includes any abandoned wells, shafts, basements, or excavations; abandoned refrigerators and motor vehicles; or any structurally unsound fences or structures; or any lumber, trash, fences, debris, or vegetation which may prove a hazard for inquisitive minors.
> 3. Any source of filth or cause of sickness, which does or could endanger the health of humans through the spreading of such nuisance by streams, surface drainage, air currents, winged life, rodents, domestic animals, humans or any other means.
> 4. Overcrowding a room or dwelling unit with occupants.
> 5. Insufficient ventilation or illumination.
> 6. Inadequate or unapproved sewerage or plumbing facilities.
> 7. Whatever is dangerous to human life and whatever renders soil, air, water, food, or drink unwholesome or detrimental to the health of human beings.
> 8. A nuisance is anything that unlawfully annoys or does damage to another and it includes everything that endangers life or health, gives offense to the senses, or obstructs the reasonable and comfortable use of property.[47]

The assumption that the environmental provisions included in the quotation from the Howard County code constitute a working base leaves over some difficult questions. The provisions do not sufficiently clarify who is responsible for what. What are the obligations imposed on owner-occupiers? On tenants? On landlords? Reaching far beyond these categories, the code places burdens in an indeterminate manner. The thrust is far beyond the neighborhood, even if broadly construed. It may well reach beyond political boundaries. The thrust is needed and should not be subject to criticism, because it illustrates the structural inadequacies of our governmental arrangements. It raises problems that must be accommodated rather than rejected as matters of immediate concern. But the problem is approachable only through a reconsideration of state, possibly interstate, and interrelated local arrangements that are more than a reshuffling of powers among existing units.

The thrust toward broader environmental controls affecting housing is an expected direction of future development. It will force revision or supplementation of housing codes. As more careful consideration is given to basic controls, the health and sanitation expertness will rise to the surface and become increasingly separated from structural and other controls. Care must be taken to see that broad delegations do not duplicate and confuse other aspects of legislative and administrative systems in state schematic arrangements. Finally, such expansions or extractions of control elements that constitute a basic environmental approach, must more critically examine the place of summary action, administrative expertness, and the balance of administrative processes with court jurisdiction that includes the tools of civil, equitable, and criminal processes. The development of housing regulation, in the American system, has not emerged as an orderly relationship between means and ends.

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[47] Howard County Housing Code, 1964, Part II, 12.02 (sec. 1).

MOBILE HOMES AND PARKS

One of the most serious defects in environmental control is the unregulated spawn of trailers and trailer parks. Some states have passed statutes regulating them. California's 1961 Chapter on Mobile Homes and Parks is noteworthy. Concern over this problem has resulted in restrictive zoning and local sanitary and health regulations applicable to trailers. The problem of the individual mobile home is one that faces the local housing jurisdiction. Should the housing code apply to individual mobile homes?

Present codes vary in their treatment, and no generalizations are possible. One city's housing code applies to mobile homes if used as residence for 30 days,[48] another states that all ''movable units'' used for human occupancy must comply with the code,[49] others prohibit occupancy of house trailers unless they are in legally established trailer parks.[50] Several exempt mobile homes only from minimum space and individual toilet facilities.[51]

Local zoning codes may reinforce a tendency of the municipality to restrict trailers to designated parks by forbidding parking of such vehicles on public streets.

Regulation of this type of dwelling unit by separate ordinance seems a more desirable method of control. Some municipalities have already formulated such regulations.[52] Maintenance provisions are the only ones easily transferable from a standard housing code. There is the additional problem that most mobile home parks are growing in unincorporated areas, and a municipal ordinance is of limited value. Either statewide or countrywide regulation is needed.

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[48] Florence, Ala., Housing Code.

[49] Memphis, Tenn., Housing Code, ord. No. 1724, sec. 8-1021, (1966).

[50] Kalamazoo, Mich., Housing Code, ord. No. 696, sec. 807, (1965).

[51] Columbus, Indiana, Housing Code, No. 1794, sec. 2.3,5.1,5.3 (1959).

[52] Wyandotte, Michigan, ch. 11, Mobile Homes and Mobile Home Parks (1963).

Chapter 3

LANDLORD AND TENANT-CODE PROVISIONS

Housing codes are becoming, or have already become, an expanding charter of tenants' rights. There is evidence that, while thrusts are being taken politically at landlords, housing codes will eventually evolve a balance between responsibilities of landlords and tenants and gradually extend coverage over additional environmental factors outside of the dwelling units themselves. Housing code administration has for much too long been viewed as unduly ministerial in application, a condition belied by consideration of its provisions. It is more than inspection to find nonconformities with code expectancies. Increasingly the element of evaluating violations in terms of their impact upon health and safety is making clear that typical codes are primarily reflections of cultural values. Increasingly it appears that housing code administrators must play a role as problem solvers in the confrontation of landlord and tenant interests. Increasingly housing code administration will have to accommodate, by staff competence or working relations with other agencies, the improvement of poor tenant capacity to live in approved houses. A role will develop in determining the proper conditions available to landlords to support eviction. More complex record keeping on settlement of disputes and conflict, and procedures to make this possible will develop so that the record findings can be reviewed by third parties in the political and judicial processes. Much of the shortcoming of contemporary administration is myopic vision about the nature of the problems involved.

Rewriting the laws of landlord and tenant in a fumbling fashion, with interplay of powerful political forces and redefinitions of judicial doctrines and jurisdictions, indicates that housing codes are part and parcel of fundamental social changes whose scope and purposes are not fully discernible at present.

Attention is here focused upon the character and quality of provisions in housing codes that contribute to the rewriting of the landlord-tenant law. Since this process is not fully conscious and is going forward bit by bit with stimulation coming from outside and from diverse sources, and because there are too many codes to analyze, a selection has been made for the purpose. The Baltimore Housing Code, or rather its provisions relating to landlord and tenants, is selected.[1] Long experience stands behind this code and its administration. Its early history was based in public health; it is now administered in an agency in which building and housing codes are combined. It contributed appreciably to the original APHA code as did Huntington Williams, the Baltimore health official. It has been amended many times. Few cities have tried as many experiments to make a housing code administratively effective.[2] For our purposes it is in the ''mainstream'' of housing codes, but the landlord-tenant problem is treated with somewhat more than average care and insight. The code has a chapter (IX) ''Responsibilities of Occupants'' and another (X) ''Responsibilities of Owners.'' Few codes have recognized the importance of this separation.

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[1] The Baltimore Housing Code, ord. No. 902, approved Dec. 22, 1966. The sections referred to in this chapter are from this ordinance.

[2] The history of Baltimore's housing code is extensively treated in *City of Baltimore: Organization for Code Enforcement*, published by the Government Studies Center, Fels Institute of Local and State Government, University of Pennsylvania (1966).

Section 902 of the Baltimore Housing Code provides:

> Every occupant of a dwelling or dwelling unit shall keep in a clean and sanitary condition that part of the dwelling or dwelling unit and premises thereof which he occupies and controls. A clean and sanitary condition shall include but is not limited to the following standards:
>
> a. Floors, floor coverings and other walking surfaces shall be kept clean and free of dirt, filth, garbage, human and animal wastes, litter, refuse and any other insanitary matter.
>
> b. Walls, ceilings, windows and doorways shall be kept clean and free of dirt, greasy film, soot and any other insanitary matter.
>
> c. Plumbing fixtures shall be kept in a clean and sanitary condition; and no material shall be deposited in any fixture which may result in the obstruction of such fixture or of any lines connected thereto. Every occupant shall be responsible for the exercise of reasonable care in the proper use and operation thereof.

Section 910 carries the cleanliness responsibility to streets, lanes, or alleys; tenants or occupants ''shall not deposit garbage or rubbish into the gutters or alleys abutting the premises.'' Section 904 requires occupants of every dwelling to provide receptacles to contain garbage, rubbish, and ashes and creates a duty to convey such matter to approved disposal areas.

Vandalism is a continuous problem in landlord-tenant relations. Baltimore provides that ''the tenant or occupant of any dwelling or dwelling unit shall not destroy, deface, damage, impair or carry away, nor permit any other person on the premises with his permission to destroy etc.—any of the facilities, equipment, appurtenances or any part of the structure of a dwelling or dwelling unit.''[3] The problem is that the tenant is often without resources, and little provision is made by ''welfare'' to compensate landlords for loss or damage. Eviction and hope for better replacements is about the effective scope of action available to landlords, whether ''public'' or ''private.''

The Baltimore code makes tenants responsible for extermination of pests, ''whenever his dwelling unit is the only one infested.'' He must lock windows and doors when he vacates the building or unit and ''leave the premises clean and free from debris and trash'' (905). He shall not ''obstruct'' means of egress (907). He shall not keep combustible nor flammable liquids or gas, ''except as provided in Article 9 of the Baltimore City Code,'' which he is somehow expected to know about or ask somebody who does (908). Nor is he to manipulate the heating controls so that the place freezes up, ''so as to prevent injury or damage to water pipes and plumbing'' (911).

No explicit statement of rule is made relative to subletting, except that ''standards and requirements for light, ventilation and occupancy as required by the code'' shall be complied with (901). Considerable discretion exists relative to light and ventilation, even though a ratio of window glass area to floor area and another ratio of openings for ventilation are specified. This discretion is in the Commissioner of Health and is simply that the Commissioner ''may approve such other device or arrangement as will adequately light and ventilate the room where provision for a window or windows is not possible'' (601). Attempts at formulae are provided for ''space and occupancy;'' these are somewhat arbitrary and without serious supporting scientific proof if challenged (801 and 803).

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[3] The Minimum Housing Code of Sioux City, Iowa, hits this problem by incorporating a direct criminal prohibition. ''Any person who shall willfully or wantonly damage, mutilate or deface any part of residential real estate, supplied fixtures and equipment and supplied furnishings or any other property of another shall upon conviction thereof be punished, in addition to any other penalty provided by law, by a fine of not more than one hundred dollars, together with the costs and disbursements of prosecution, or be imprisoned for a period of not to exceed thirty days'' (Sec. 9.12). One might wonder what happens in meeting these costs when the tenant is on welfare.

The lesson expected to be drawn is that provisions such as these do not produce the kind of issues easily handled by courts. The getting the ''facts'' before juries seems difficult and clumsy. It must be considered that the inspectors and officials of the administrative system are in direct contact and most capable of the quality of expertness necessary to establish violations, record the evidence, and establish responsibility. It is this administrative process and its results that should go before the courts, not the evidence that can only be evaluated competently by those familiar with the criteria prevailing in different situations.[4]

Chapter 10 is entitled ''Responsibilities of Owners.'' The problem of ''crowding'' is best controlled through control over subletting; restraints are imposed on the owner as well as the tenant. This restraint is focused upon vacant or vacated buildings or dwellings that are not in compliance. The general restraint is qualified however by a requirement that permission may be granted ''for such occupancy—by the Building Inspection Engineer. Such permission shall not be unreasonably withheld.''

Section 701 of the Baltimore code approaches the key problem of habitability:

> Every dwelling and all parts thereof used or occupied as a dwelling shall, while in use or at any time when the lack of maintenance affects neighboring property be kept in good repair, in safe condition, and fit for human habitation. The roof and walls of all such buildings shall be maintained so as not to leak; and all means of draining water therefrom shall be maintained as to prevent dampness in the walls, ceilings or basements.

Section 703 undertakes to spell out ''standards for good repair and safe condition.'' The owner would be under no greater obligation if the tenant obtained such a provision by contract, lease, or covenant.[5]

The owner in larger buildings (three or more dwelling units) shall supply metal receptacles for garbage, rubbish, and ashes ''watertight and provided with handles and tight covers'' (1003). Provisions are made for heat, how it shall be measured, and allowable variations (1004). While tenants are responsible for eradication of pests in their apartments, the owner becomes responsible for eradication ''when infestation exists in two or more of the dwelling units in a dwelling or in the shared areas of a dwelling'' (1005). Owners are told to keep alleys and gutters clean, to notify guests of exits, and post identification of himself or agents ''or supplied in writing to the occupants of the dwelling'' (1007).

Since, in Baltimore, multiple dwellings are licensed, it is not unreasonable to require the owner, or person to whom the license is issued to: ''display it in lobby, vestibule or other prominent or public place on the premises during the period it is effective.'' Such an array of provisions, inter alia, clearly indicates that the relationship between landlord and tenant is not left to open market bargaining or even that there is much left to bargain about the matters considered. It is in this sense that housing codes are superseding the traditional legal order relating to landlord and tenants.

When an attempt is made to consider the purposes of codes, a generalization seems possible that has been overlooked. Codes have overemphasized what must be done. They have not particularized who should do what needs being done.

The Wyandotte, Michigan, Housing Code illustrates the failure to recognize the nature of the issue: ''Owners of premises shall be responsible for compliance with the Housing Standards, and shall remain responsible therefore regardless of the fact that this chapter may also place certain responsibilities on operators and occupants and regardless of any agreements between owners and operators or occupants as to which party shall assume responsibility.''[6] Such a provision leads to bitterness and frustration on the part of landlords as though this was official policy of the city.

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[4] See chapter 12, p. 115.

[5] In 1879, a Michigan court advanced a theory of implied warranty that a dwelling unit offered for rental was, and presumably must be maintained, habitable. (This was not followed by other courts; if it had, the housing code problem would probably have been considerably different.)

Even when codes are less specific in holding landlords responsible regardless of guilt or conduct in violation of the provisions, it is not uncommon for landlords to be held responsible for violations, regardless of fault, especially when health or sanitation matters are involved.[7]

Admittedly, it is difficult to meet criminal court standards of evidence, upon which codes excessively rely for enforcement against tenants. While this may ''explain'' injustice on a pragmatic basis, it does not accomplish a mature public interest. The fact that poor tenants easily become political activists, especially when belonging to primarily minority population clusters, makes the issue more complex but does not warrant overlooking balanced responsibilities as elements in a system of justice.

Some recognition that the landlord's excessive liability must be relieved is evident in a number of codes. New York City's new housing code holds the tenant responsible for the cleanliness of the dwelling unit's interior, a duty previously imposed upon the owner.[8] The code also allows eviction for noncompliance, but the Council changed the provision to read that ''conviction'' of a tenant for violation, instead of ''any violation,'' is necessary for eviction.[9]

Codes would be improved if they were rewritten with each provision clearly assigned to (1) owner-occupants, possibly with consideration to separating single-family from other properties; (2) owners and their agents, including consideration of various interests involved in the property; (3) tenant occupants, with consideration of reciprocal obligations to landlords; (4) tenants in relation to other tenants; and (5) both tenants and landlords related to neighborhood, environmental obligations. There are few, if any, provisions in housing codes that are not related to categorical duties and reciprocal obligations. The housing code administration should not be conceived as a policing system but as a supervisory body to see that obligations are carried out in terms of rules and regulations especially interpretative of local conditions. However considered, the core problem pivots around the landlord and low-rent tenant. The administrative process must be geared to the pivotal issue.

The vandalism problem is recurrent. Section 1010 of the Baltimore Code provides ''The liability of a tenant or occupant of a dwelling or dwelling unit arising by reason of a violation of section 906 (previously noted) or section 911 (previously noted) of this Code shall not relieve the owner of his duties and responsibilities under other provisions of this Code.'' In other words if the tenant destroys property and the landlord cannot obtain restitution—a difficult matter when the tenant is on welfare—the landlord is expected to go ahead and repair the damage at his own expense. Some mechanism, other than court remedies, is badly needed to deal with this problem in Baltimore and in practically every city having a housing code.

Practically every other provision having substantive impact is the responsibility of the landlord. One cannot find out the range of his obligations through reading the Code. Fire extinguishing equipment must comply with ''ordinances and regulations of the City of Baltimore.'' So shall fire alarm systems, but these shall be ''provided and maintained in an operable condition.'' Less than specific reference is made to the building code under general language: ''laws and ordinances of the City of Baltimore.'' Some references are more specific; flues and vents shall not be used for connecting appliances ''unless the appliance has been approved by the Building Inspection Engineer and the Chief of the Fire Department as one not requiring venting.'' The point being stressed is that the code is not sufficiently complete to give a landlord instructions; he must do considerable additional checking with other officials. Some situations result in a substantial transfer of discretion, as for instance in the determination of waterproofing floors and walls. The code provides that, The Building Inspection Engineer may use discretionary powers as to this item. The determination that a building is unsafe is delegated to the Building Inspection Engineer and a rooming house once vacated for reasons of hazardous condition ''shall not again be used for human habitation or otherwise until the hazard has been eliminated and either the Building Inspection Engineer or the Commissioner of Health, or whoever issued the order to vacate, has given written approval of reoccupancy'' (Chapter XIII, sec. 1301). Some cities provide simpler guidance, and this seems a desirable practice to be recommended.

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[6] Chapter 3, Part 3, C301. (1963).

[7] This problem is discussed in pages 810, 811, in the article ''Enforcement of Municipal Housing Codes,'' in the *Harvard Law Review*, vol. 78, (1965), by R. Carlton, R. Landfield, and J. Loken.

[8] N.Y.C. Housing and Maintenance Code, (1967), art. II, sec. D26-11:05.

[9] June 22, 1967, Report of the Committee on Buildings in favor of adopting as amended a local law to amend the charter of the City of New York and the Administrative Code of the City, in relation to a new Housing and Maintenance Code.

The conclusion can be reached that housing codes include a degree of specification-type provisions but that most of the standards involve judgment. Much of the expertness to cover the range of housing code provisions is outside of the typical housing code staff. The ''high cost'' items involve considerable discretion. It is desirable that instructions be provided to minimize costs. No provision is made for this service. No provision is made to provide technical help for ''do-it-yourselfers.''

In evaluating typical American housing codes an interesting contrast with parallel Canadian codes is worth noting. The American codes, compared with the Canadian, unduly insist that there is a technical base for criteria. The Canadian codes are given to rely upon standards of good practice, recognizing the standards in popular use. The Canadian approach seems worthy of greater consideration as American codes reach farther into subjects that have little technical or scientific basis for support. There is a flexibility and adaptability in the Canadian system that is appealing.

Chapter 4

THE SOCIOECONOMIC EQUATION: THE TENANTS

> The causes that operate to obstruct efforts to better the lot of the tenement population are, in our day, largely found among the tenants themselves. This is true particularly of the poorest. They are shiftless, destructive and stupid; in a word they are what the tenements have made them. It's the dreary old truth that those who would fight for the poor must fight the poor to do it.[1]

Housing code administration is focused primarily in the low-income neighborhood areas. These accumulate in larger cities of increasing populations of low-rental tenants and their landlords. Housing code administration is a means, or tool, trying to ameliorate conditions in these areas and among their inhabitants. It is conditioned by, and must be responsive to, these conditions. To a growing extent, codes, and their administrations, constitute means through which government is reassessing and redefining environmental factors that influence these conditions. Code administration is so intertwined with the people concerned that they are part of the administrative problem itself. Too much emphasis has been placed on the physical factors; the socioeconomic factors have been given too little attention. A reevaluation of relationships between means and ends, with more appreciation of complexities, will add insight to code administrative undertaking.

This analysis opens the Pandora's box of socioeconomic elements only enough to create awareness of what is inside. No attempt is made to shape full understanding definitively, but enough insight is provided so that the tremendous difficulties housing code administrators must face can be appreciated.

Socioeconomic Status of Low-Rent-Paying Tenants

Contrary to a widespread impression, the poor and very poor in the congested rings around business districts in older cities are much given to moving from one abode to another. "The rates of residential mobility in deprived urban areas where lower-lower class people tend to live are extremely high."[2] This movement stems from self-motivated family decisions to seek more satisfactory quarters as well as from rent arrearages, skips, and evictions. Adequate information about causation of evictions is lacking, but forces are at work that augur that restraints imposed on landlords, if balanced by corresponding responsibilities of tenants, may reduce the numbers involved. More nearly adequate development of code administration record systems relative to housing conditions should prove a factor in reducing what is, at present, strong polar emotional response about this problem.

Increasing tenant responsibility, as a counterfactor to restraining landlords, has been assigned as a factor in maintaining livability of dwelling units. A pamphlet

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[1] Jacob A. Riis, *How the Other Half Lives.* (1890). p. 273. N.Y. Scribner's Sons 1907.

[2] Keller, Suzanne, *The American Lower Class Family,* A Report prepared for the New York State Division for Youth. (Albany, N.Y. 1965), p. 23.

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publication, ''Maintaining Decent Dwellings'' was made available in 1963. A survey, using a penalty scoring system, had been completed, and results were reported:

> As the penalty scores indicate, there is an enormous difference between the best-maintained and the worst-maintained apartments. In many of the former, it was the tenants themselves who bore some, if not all, the responsibility, the expense and the actual work of the upkeep. Such apartments were clean, comfortably furnished and attractive. In the latter group, on the other hand, poor housekeeping added to, and was often a contributory factor in the wretched conditions of the dwelling unit. Although the temptation is great to blame the landlord for such conditions, there seemed to be some evidence of refusal or unwillingness on the part of some tenants to allow the repairs to be made.''[3]

A number of housing code administrations are now, or have been, experimenting with different types of programs to increase tenant understanding of living conditions and responsibilities. The depth of tenant ignorance or despair is indicated by a recent comment by a landlord's employee in Detroit: ''If you're living in a dump you don't mind throwing garbage on the floor.''[4] Instability in low-rental areas is accompanied by physical insecurity. ''A number of studies agree that life in the lowest social class is often violent and generally highly unstable as people move about seeking work, adventure, escape from the law, or more living space.''[5]

A health inspector after a tour of one New York tenement, said:

> No matter how much you put into this building, it will still be a slum. Why? Because of the type of tenants. They break everything. They are destructive and mischievous. They are drug addicts and prostitutes. They go up on the roof and on the way they destroy the inside of the building.[6]

An attorney, responsible for starting the investigation of the same infamous 311 E. 100th Street (the subject of Klein's book), had this to say:

> Landlords who own buildings in East Harlem know what they are getting into—they want to pull out as much as they can as fast as they can. I have very little sympathy for them. The tenants come from huts with dirt floors and no bathroom or toilet facilities, with chickens and pigs wandering in and out of their homes. You throw them into a highly complex urban set-up and they're supposed to know how to live. They don't. They do destroy the landlord's property.[7]

Movement from place to place occurs within restricted areas, in spite of the severe limitations imposed by dependency upon welfare subsidies. This movement is not confined to shifts among private housing units, it also extends to ''ins'' and ''outs'' of public housing. Terms of contracts with landlords, together with restraining rules and regulations imposed on tenants, play a part. These restraints cannot be overlooked lightly. As housing codes develop greater coverage they increasingly reach into clarifying and controlling landlord-tenant responsibilities, and the day may not be far off when the housing code administration, or some affiliate administrative unit, may be the negotiating and arbitration center relative to such matters.

At present there is competition to obtain tenants who are socially acceptable and who might be called the ''worthy poor.'' There is even more market competition to keep the undesirables out. This competition extends over both public and private housing and is of a degree of importance that is difficult to overemphasize.

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[3] *Maintaining Decent Dwellings*, Women's City Club of New York, (April, 1963), a pamphlet, p. 16.

[4] Reported in a signed article by Jerry M. Flint in *The New York Times*, June 28, 1968, p. 46.

[5] Keller, op. cit., p. 24.

[6] Woody Klein, *Let in the Sun*, (1964), p. 183. N.Y. MacMillan 1964.

[7] Ibid., p. 221.

In 1965, a Central New York Rental Property Owners Association was formed. The organization asserted it was in favor of housing code enforcement and was designed to keep landlords out who did not undertake to provide housing in compliance with codes. It hoped to maintain relations with the code administrators and to cooperate with welfare agencies seeking living quarters for clients. But probably of greatest moment was the making and maintaining a ''register'' of undesirable tenants.[8] This operation did not include the Public Housing Administrator in the area, and pressure soon developed through which the ''blacklisted'' tenants sought haven in public housing. An interesting side effect reported concerning this undertaking was an appeal from the social agencies in the area for help from landlords in detecting early symptoms of family disorganization.

In a progress report made available by the New Orleans Division of Housing, it is noted that a New Orleans Property Owners Association has come into existence which has initiated a tenant referral system. The report states: ''If a tenant continues to abuse property, he may find himself slated for slum conditions as long as he lives in New Orleans''.[9]

''Crime in the streets,'' burnings, and threats of violence encourage movements that can be provocative of oversimplified solutions. Such a one is the thrust toward ''tenant rights.'' Rights must be correlated with duties and responsibilities. The complex must be securely based in cultural understandings. Development of tenant rights can easily provide a force that can undermine impartial code enforcement, especially when codes are increasingly incorporating provisions that define reciprocal duties of tenants and landlords and their mutual obligations under government. Hopes are easily aroused among the poor; expectations unrealized stimulate despair and hostility.

When noisy, dirty, lawless, or immoral family units move into a housing complex, whether it be an apartment house or a neighborhood cluster, the intrusion may set off a chain reaction. Families struggling toward respectability or trying to hold onto the status they have achieved move out. Landlords do what they can to protect those concerned with established values, who are usually more dependable rent payers as well as better neighbors. Moreover, they are more likely to have a developed sense of property values and societal rights.

The least desirable living quarters are often in the least maintained buildings. They may well present some code violations. Such buildings are least likely to exclude social derelicts. Landlords have usually lost control over effective tenant selection and will often settle for poor rent payers. They know that replacements will probably be comparable with what they now have. This tendency causes an accumulation of the ''worst'' tenants in the ''worst'' housing units. Under such conditions, a landlord will evidence a degree of tolerance that would be impossible in less deteriorated circumstances. He knows that vacant apartments in such situations are especially subject to vandalism.

The superintendant of ''311,'' a building that lived from days of middle-class glory to add to the dregs of east Harlem's slums, looked back over 15 years' residence and observed:

> What brings people here, is that nobody else in the city will take them. They come here, and their kids write all over the walls, dump garbage and throw bricks. They fight all the time and ruin the cars parked on the block. I'm telling you, it ain't the landlord that tears up this building. The landlord don't live here.[10]

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[8] Eleanor Rosebrugh, ''Do Welfare Rents Subsidize Substandard Housing?'' *Journal of Housing*, vol. 24, No. 2 (Feb., March, 1967), p. 103.

[9] Progress Report, dated July 31, 1968, of the New Orleans Division of Housing Improvement and ICAF (Irish Channel Action Foundation) Drive Against Blight in the Irish Channel Target Area, p. 7.

[10] Klein, op. cit., pp. 176, 177.

The superintendant, Mr. William Davies, also observed: ''Why can't these people bring garbage down instead of throwing it out the windows? If they didn't feed the rats with garbage, there wouldn't be any rats.''[11] In New York a perennial campaign and health department work force struggles as much with tenants as against rats. Norway rats, the most common type here, require an ounce of food per day. The handbill distributed by the Department of Health, urges apartment dwellers to keep their dwelling clean, store food in covered jars or cans, and dispose of their garbage in tightly covered pails. ''Do not throw garbage in the yard, hallway or dumbwaiter shaft. Keep your baby's crib clean. Wash your baby's face and body before putting him to bed. ...'' A reporter for the *New Yorker* was shown an alleyway between two rows of dilapidated brownstone buildings, near Madison Avenue. The Health Department worker said: ''You wouldn't believe what this place looked like when we arrived. Tenants in this block had been air-mailing refuse out of their windows for years, and in some places the accumulation was seven feet deep.''

The Health Department guide, Mr. Murry H. Raphael, director of the Bureau of Pest Control had this to say:

> Most of these buildings are in shocking condition. They have no superintendents and no incinerators, and many of the people who live in them are despondent, without hope or pride. Some of them have come to the city from rural areas, where sanitation is not of such crucial importance. What we're trying to do is show them we care. We're also letting them know their responsibilities. We go from door to door explaining that we'll clean up the mess but that it will then be up to them to keep things clean.[12]

A major real estate holder is quoted in another recent book on the tenements:

> Some tenants might appreciate certain improvements and, therefore, might pay some additional rents, whereas other tenants wooldn't care or couldn't pay more, and as result some might move out. I wouldn't want to take the chance of vacancy, vacancies lead to vandalism and looting. It's better business to be fully rented at the expense of getting top dollar. ...
>
> The landlord's fear of substantial vacancies is a very real one. A fairly typical process is for the landlord of a six-family house to lose two or three tenants at once. Either he rents to undesirable tenants and thus drives out the balance of his tenantry, or he runs the risk of a group of delinquents moving into one of the vacant apartments by breaking through a window or by kicking down a door and proceeding to vandalize the premises. It is not uncommon to find that bathroom fixtures and piping are removed to be sold to junk dealers. Lighting fixtures and other elements of value are often removed also. The end result is a vacant parcel with little residual value.[13]

Concentration of tenants having unsocial, antisocial, and rural-oriented habits stimulates potential conflict with landlords. An Attorney General's Report prepared in 1967 observed: ''Those who are forced to live in dirt and squalor produced by others are all too likely to start producing it themselves.''[14] The resultant rise in dissatisfaction, reaching abnormally high development in the worst housing situations, will easily find or produce tenants who are ''motivated by a desire to avoid payment of rent or to harass their landlords. Especially in the worst buildings, the tenants themselves, through carelessness or vandalism are a major cause of code violations.''[15]

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[11] Ibid., p. 176.

[12] *The New Yorker*, August 3, 1968, pp. 23-25.

[13] George Sternlieb, *The Tenement Landlord*, (1966), p. 94.

[14] *Tenants' Rights: Legal Tools to Better Housing:* A Report on a National Conference on Legal Rights of Tenants (Washington, 1967), p. 6.

[15] Ibid., p. 33.

It is an oversimplified explanation to consider that substandard urban neighborhoods are oriented to a non-middle-class culture. The observable differential seems more to be the apathy of defeat of a class that feels excluded from society than an independent cultural pattern. Some of the contributing elements affecting code enforcement can be outlined and must be considered in analyzing the conditions confronting code administrators. Two problem-type families have great impact on code enforcement. One researcher notes: ''Miller is particularly interested in what he calls the 15% hard core, female centered households in which serial monogamy is the prevalent pattern. This hard-core group, which seems to be particularly prevalent among the lower class Negro and Irish''[16] creates difficulties in determining responsibility patterns. In a study of slum populations in Chicago by Drake and Cayton, ''a large proportion of the households are headed by females with illegitimate children whose common-law husbands tend to abandon them without support.''[17]

The second type family prevalent among the concentrated poor is the ''extended'' family. In the population studied by Drake and Cayton, ''most households included ''extended'' families consisting of nuclear family members, boarders, lodgers, and impecunious relatives living in overcrowded quarters. There was continuous movement from building to building in search of lower rents or more adequate accommodations.''[18] The problem of density or overcrowding is one of the most difficult to approach in housing code administration. Without doubt, the primary entrée should be through amelioration of the social and economic condition rather than an attempt to use police power and criminal penalties.

Keller reported findings on the low-income family's psychological orientation toward housing: ''Finally in their attitudes to homes and possessions, it appears that lower-lower class individuals value appliances more than their houses which they tend to neglect. The authors feel that this might reflect a deep character trait—to value the acquisition of possessions, but not the taking care of them.''[19]

Some housing code administrative programs have reached into the deeper social problems than have the great majority. The trend is toward recognizing interrelationships. Baltimore undertook housing clinics. This is, however, used as part of the penalty system, and attendance is an alternative to a fine.[20]

Mr. Charles Moerdler resigned as New York City's Buildings Commissioner in July 1967. He urged that ''education should be through tenant clinics run by grass-roots block organizations.'' He stated that the aim should be to teach people ''basic housekeeping techniques. ... There are some people—few in number, but some—who still have not learned basic standards of decency.'' He noted that garbage-littered streets and backyards in the slums were present but ''the landlord didn't put the garbage there.''[21]

The worst conditions in large areas in New York City in privately owned housing is almost unbelievable. There is a section of Brooklyn called Brownsville in which some 125,000 people live. Only 4 percent of the apartments are considered up to standard; the median income of tenants is less than $3,500 a year. ''The stable Jewish population moved out and took all their institutions with them,'' a teacher with 17 years' experience in local schools is quoted as saying. ''The people of Brownsville rank at or near the top in juvenile delinquency, welfare cases, narcotics addiction, venereal disease and infant mortality. Their life is a constant battle against fear.'' A Brownsville Community Council was established with a Major Owens as director. He reminisced: ''The exodus was accelerated when a huge public housing project brought in a large number of Negroes and Puerto Ricans from outside the community.'' Annette Thomas lives with her mother, five brothers and sisters, and her own baby at 70 Herzl Street. She is quoted as saying, ''Last night across the street they threw whiskey bottles through every window. One more fire and I'm getting out with my baby. This neighborhood is just bad.'' A worker for the community council related that in the constant battles against vandals a woman was afraid to leave her apartment during a cold spell because she was afraid of being robbed. Mrs. Shirley White, from the neighborhood, said: ''You can wake up in the morning drowning if someone steals the pipes. The thieves on our blocks are nice though; they turn off the water first before they strip the building.''

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[16] Keller, op. cit., pp. 23, 24.

[17] Ibid., p. 11.

[18] Ibid.

[19] Ibid., from a study made in 1963 by Cohen and Hodges, p. 23.

[20] The operation of the clinic was described in Richard Bateman and Herbert Stern's article ''Housing Clinic for Code Violators,'' in the *Journal of Housing*, (April, 1966), pp. 203-205. Interested persons are urged to review the article.

[21] *The New York Times*, July 10, 1967. p. 24.

Donald Elliott, chairman of the City Planning Commission has observed that local workmen could organize to maintain the buildings but that ''any such program would require vast subsidies, since the tenants could not afford enough rent to maintain the buildings on their own.''[22]

Between January 1, and July 26, 1968, firemen in New York City were attacked 451 times with objects such as bottles, stones, beer cans, and wood while answering alarms in slum areas. One fireman has been shot and six injured by air-gun pellets. One cause is said to be too low a percentage of Negro or Puerto Rican firemen. ''Another grievance is that vacant and abandoned buildings are used by drug addicts for 'needle parties' and the firemen are blamed for not having the buildings closed,'' Fire Commissioner Robert Lowery has commented. He added, ''Of course, that isn't the Fire Department's responsibility. But some people think the only way they can get rid of such buildings and the menace they are to children is to burn them down. And they are not glad to see the firemen fight the fires in such buildings.''[23] Among the community leaders involved in the discussion leading to the commissioner's comments was one from Brownsville; there were 29 others.

Dr. Krumbiegel, the administrator of the housing code in Milwaukee, has been forced, in face of threatened resignations, to take his inspectors out of uniform. They were taken to be either policemen or symbols of authority, and repeated attacks by young Negroes had resulted in a number of injuries and widespread fear.[24]

An interesting gap appears in commentary about the problem of low-income tenants. A make-believe attitude that is widespread is that the problem is one of providing physically improved housing and that tenants will respond to such environmental stimuli. When, however, confidential relations are established with administrators in large cities, without exception, the problem takes on a much more complex appearance. The best expression of this widespread concern appears in the following excerpt from the 1968 budget message of the Commissioner of Buildings in Chicago:

> Ways will be sought during the coming year to expand and improve upon tenant education programs. Tenant education has become a major concern of code enforcement. The number of buildings in the city that are structurally deficient is becoming less and less of a problem. But a major problem remains with housekeeping type violations.
>
> There are far too many persons who are ignorant and/or negligent in proper housekeeping habits, and this is a major cause of deterioration. I am not talking only of dirt and garbage, bad as that in itself is. I am referring also to broken plaster, ripped out carpeting, holes in walls, broken windows, broken plumbing, etc. At the present time, notices of violations given to tenants are referred to the Cook

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[22] The material and the quotations on Brownsville, are from an article ''Brownsville Sinks in Decay and Fear,'' by Steven V. Roberts, in *The New York Times*, March 7, 1968, pp. 39, 53.

[23] Article under the name of Will Lissner, *The New York Times*, July 27, 1968, p. 23.

[24] Interview, July 18, 1968.

> County Department of Public Aid and the Chicago Committee on Urban Opportunity, who conduct classes in proper housekeeping methods and procedures.[25]

It is little more than fantasy to assume that ''education'' will solve the problem of the tenant who is unresponsive. Just how many of these exist can only be determined through trial and error. Every family must be given as much opportunity to acquire living habits compatible with community organizational conditions in urban environment as can reasonably be paid for with community or national funds. But when education fails, if the responsive and the unresponsive are left in the same nix as before, the cycle toward general degradation will be reestablished. The ''nix'' must be broken so that the unresponsives are separated. This will give a reasonable chance to the responsive families to establish and maintain community neighborhood standards. The criteria of acceptability as applicable to tenant responsibility run not only to landlords but also even more fundamentally to other neighborhood peers. Some, hopefully most, of a great majority will respond to concentrated education and counseling. But this service is not without limits; it enters into an equation of how public funds can best be spent for the public good. In ''Slumlordism as a Tort,'' Sax and Hiestant recognize the problem of paternalism as a handicap in promoting self-reliant tenants:

> Another matter little considered in the present law, although obviously central to the realities of enforcement, is the undeniable fact that the deplorable conditions of slum-housing are attributable in significant part to the tenants themselves. This fact inevitably undermines rigorous enforcement, and leads to that form of paternalism which views all tenants as non-culpable victims of an unfeeling social system...we must impose rigorous standards on the landlord at the same time that, and only to the extent that, we give the slum tenant a genuine incentive to maintain the property he rents. Again the issue is paternalism: to enforce the codes for the benefit of all tenants, whether or not they do the right things themselves, is to view the tenant as an object to be acted upon and not as a potentially responsible and self-reliant citizen. In this perspective, the proposal to be urged herein - that there be recognized a private tort action for the awarding of substantial damages to the tenant who is not himself culpable - may very well promote precisely that incentive to self-help and self-reliance which is so central to the poverty question.[26]

Although the authors do not include the suggestion, it can be added that one tenant ought to have an action against another to preserve his integrity against the impervious and case-hardened neighbor.

What is to become of the families impervious to such services as can be brought to bear? Where, how, and by whom is the line to be drawn and the official decision made to protect the responsive from the unresponsive? At least the premise inherent in seeking effective housing and environment for low-income families is that this question must be faced. It is a necessary factor in housing code administration but not properly considered to be of housing code expertness.

The problem of the unresponsive, unemployable poor presents a housing problem of greatest importance, especially to the responsive poor. A recent national report observed: ''Where public housing constitutes a large portion of the available low-income housing, it may be unfair to limit access to public housing to the 'deserving poor' while expecting private landlords to maintain their premises at code standards. The concentration of the worst tenants in the private dwellings may become so high as to render satisfactory maintenance virtually impossible.''[27] With equal justice it can be stated that the concentration of worst tenants in public housing will ensure its becoming a slum or ghetto. Interviews with responsible professional social workers have produced consistent assurance that concentration of irresponsible families, whether in public or private housing, is a greater handicap to neighborhood and family living than are the dangers that flow from all but the most hazardous code violations.

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[25] 1968 Budget Message, dated November 22, 1967; Sidney D. Smith, Commissioner of Buildings, Chicago, Illinois, p. 12.

[26] Joseph L. Sax and Fred J. Hiestand, ''Slumlordism as a Tort,'' *Michigan Law Review*, vol. 65 (March, 1967), p. 873.

It is not in the public interest that landlords, public or private, vie with each other to keep the unresponsives out. Nor is it in the public interest to seek a uniform distribution of such families indiscriminately among all low-rental housing. Uniform distribution will debase the quality and defeat the attempt to ''move'' low-income living environment nearer to ''middle-class values.'' One of the characteristics of middle- and upper class housing is the visible exclusion of the unacceptables. A major difference between middle-class suburb and slum is the absence of persons who give atmosphere and tragedy to the slum.

Grigsby's analysis is sufficiently in agreement with the findings in this study that his cogent observation on the growing concentration of problem families in substandard housing is appropriate:

> By 1970 it is possible that the vast majority of low-income families and individuals living in substandard housing will be multi-problem cases whose most serious difficulties are not housing at all.[28]

Whether or not Grigsby's gloomy view of the problems facing housing code administration is fully confirmed, the fact remains that housing codes with their reliance on police-type inspections, hearings presuming full rationality and responsibility, orders without evaluation of capacity to respond, reinforced by court trials and penalties are not the tools that accommodate the fundamental issues facing society. The problem is not within the province of police power. Only the symptoms are within reach and these only with a tragic failure to distinguish willful from pathological behavior.

Neither the conceptual base, the orientation of staff, the techniques of attack, nor the resources available to housing code administrators are geared intelligently to the quality of problems that lie ahead--and not far ahead at that.

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[27] *Tenants' Rights*, op. cit., pp. 34, 35.

[28] William G. Grigsby, *Housing Markets and Public Policy*, (University of Pennsylvania Press, 1963), p. 283.

Chapter 5

LANDLORD ECONOMICS

Although no educational or persuasion process will achieve perfect response, the great majority of low-income families can be brought into viable relationships with peer families within buildings or neighborhoods. Families unresponsive to available resources must, sooner or later, be extracted from the community unit they destroy and given consideration as pathological. The extraction and provision for the pathological is not, and should not be, the responsibility of code administration.

The confrontation of code administrators and landlords providing quarters for low-rental families is of a different nature. Whereas the problem with low-income tenants is primarily educational and motivational, the primary issue confronting landlords when they face code enforcers is economic.

Writing 7 years ago, Grigsby noted code enforcement, if vigorous, would result in landlord's passing most of the cost of improvement on to the tenants.[1] This, of course, does not seem to be meaningful when the market is primarily welfare clients. The relative inelasticity of low-rental housing has probably increased with the combination of urban renewal clearance and code enforcement abandonment. As long as these factors, that is, welfare rates, urban renewal demolition, and code enforcement, are dominant factors, the hoped for freedom of choice by occupants is unlikely to develop.

It may not be sufficiently appreciated that welfare budgets bind landlords as well as tenants. There is an inevitable scramble for the better apartments, and there are never enough to go round in most places where low-rent tenants accumulate. A survey was made of welfare departments in 16 Western states with a central purpose of determining relationship between welfare payments and tenants occupying substandard dwellings.[2]

> Welfare departments close their eyes to the miserable living conditions supported by public dollars in order to avoid having the client's rent raised or to avoid pushing him into a tight, low-cost housing market where he cannot buy standard quarters at a price consistent with his welfare check. We cannot refuse to allow shelter costs in a welfare budget because the dwelling is substandard when neither we nor the welfare client can find a standard dwelling which he can afford.

A particularly interesting reply to a questionnaire was to the effect that an operating ''leased housing program'' has been established by a housing authority ''that has eased the situation somewhat.''

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[1] William Grigsby, *Housing Markets and Public Policy*, (1963), Philadelphia Univ. of Penn. Press, pp. 313 ff. Sternlieb underscores this problem when he says ''There is a well-founded fear on the part of the tenantry that rehabilitation leads to rent increases. This must be accepted as a fact of the market.'' (*The Tenement Landlord*, 1966, p. 234.) Almost 10 years ago, McGraw-Hill, 1959, Nash recognized that ''Somebody has to pay for improvements'' (p. 91)...and that ''Housing Code provisions must bear some reasonable relationship to the tenant's ability to pay'' (p. 96). (William Nash, Residential Rehabilitation: *Private Profits and Public Purposes*, 1959.)

[2] Melvin B. Mogulof, ''Subsidizing Substandard Housing through Public Welfare payments.'' *Journal of Housing*, Nov. 1967, vol. 24, pp. 560–563.

The welfare rates seem better coordinated with a subsidized than a nonsubsidized one. The basic conclusion of the study was that welfare funds were being used generally to support tenancy in substandard housing. It seems justifiable to say that it is the standard American welfare policy to pay clients an amount to keep them just below the line considered by the same American public to constitute standard housing. When a condition exists as consistently as does the gap between housing of welfare clients' allotment for rent and the cost of standard housing (with public housing sometimes available to subsidize the gap), it might be said that Americans consider it in the public interest to keep welfare clients in slightly substandard housing as the normal state of affairs.

A primary consideration in evaluating housing code administration is the permanence and gradual increase in the families subsidized by welfare. ''Allotments'' for rent result from formulae that give little, if any, practical consideration to housing market conditions, trends in upkeep costs, taxation variables, or impact of other governmental policies. Is it possible that the government is incapable of recognizing these elements? Is it possible that in determining welfare allotments no attention is paid to availability of rental properties meeting code requirements? Is the government concerned with whether or not competitive private enterprise can reasonably be expected to provide housing at rates prescribed, in effect, by that government?

Governments raise wages and salaries to meet cost of living increases. Why shouldn't the same principle apply to welfare payments? When a government moves to impose additional costs on owner occupants and landlords shouldn't there be some determination about whether the increases relate either to capacity to pay or to making a reasonable return on investment? The answer to all these questions seems to be that government in relation to keeping welfare subsidies related to housing code costs and taxes is quite oblivious to elementary housing economics.

Two trends emanate from HUD relative to housing code administration. First, the substantive requirements are gradually increased. This means higher expenses for owners and landlords; second, greater insistence upon enforcement is being made as a condition to obtaining urban renewal funds. As in much social legislation, the unexpected results may prove of greater long-term consequence than the expected results. It probably was not, nor is not, the intention to subvert private ownership of low-rental housing but the trend in this direction is well established. The increased emphasis on code enforcement continues and escalates the pressures already established. In another generation all low-income housing may well be subsidized but through an agonizing process. The present tendency is to provide a variety of subsidy programs; a current slogan is to get greater participation of private capital. The result is to get more governmental subsidy programs with private involvement, some based upon profit motives and others upon other motives not so easily discerned.

The advent and expansion of public housing was not predicated upon a theory of providing a ''yardstick'' for measuring reasonable relationship between investment and profits in private housing. But public housing, carrying a subsidy of some 25 to 40 percent, now directly competes with private housing. Public housing has been able to select its tenants, leaving the worst tenants to private housing. Now comes housing code enforcement and undertakes to provide an end to substandard housing altogether. This confrontation of governmentally subsidized housing of high structural safety and competent services with private housing, increasingly held to safety standards and services comparable with public housing, is destined to destroy the unstable equilibrium in which substandard housing accommodated the least desirable tenants. Public housing was not designed for welfare recipients; it was to keep people off welfare rolls. Now welfare patients move freely in and out of public and private housing, and competition is direct.

Providing housing facilities to the poor has always been a business, except for public ''poorhouses'' and prisons, asylums, orphanages, and sometimes hospitals. Business men are presumably out to make a profit. There is no overwhelming reason why government cannot consider low-income housing sufficiently identified with public interest to prevent "unreasonable" returns on investment and services. But when government moves to limit returns, as it does in most public utilities, it also assumes some responsibility to see that opportunity exists to make a "fair" profit. Since determination of values supporting reasonable return on investment is complicated, governments normally establish complex regulative systems with attached fact gathering and evaluating competencies.

Housing code compliance normally involves expenditures beyond those necessary at the time a housing code is adopted. If profits are reasonable, or competitive within a relatively large market area, it will be possible for landlords to pass on to renters the increased costs. But this is true only if tenants are free to move or can make additional rental payments without cutting into other necessary expenditures. But some landlords, making a competitive profit when a housing code is imposed, find that they are called on to make substantial expenditures even though they serve tenants who derive their incomes from "welfare." Their "allotment" for housing is a fixed part in an equation in which every dollar is allocated for necessities. There is no flexibility to speak of, and the landlord cannot raise the rent without evicting the tenant.

Housing codes, and their administration, are tools to improve the lot of the poor. They are particularly focused upon the low-rent-paying families. The tool has sharp edges when honed by urban renewal insistence and with supplemental monetary inducements. Stepped-up enforcement causes the tool to be wielded so that the edges cut indiscriminately; landlords who can meet the higher costs through rent increases are not seriously affected. But landlords who have tenants with incomes tied to welfare, cannot, on the average, make substantial investments to meet code requirements and still make a reasonable profit. Some can do no better than lose money. Housing code administration does not have the necessary machinery or obligation even to find out whether a landlord is in one class or another.

It is in relation to the "worst" housing that the housing code comes to grips with the landlord. As can be reasonably expected, the "worst" tenants live there. An overlooked factor in evaluating the role of landlords in housing code enforcement is that governmental policies divide low-rent landlords into two classes. Since no low-rent landlord can be expected to compete with public housing subsidy over a relatively long period of time, the classes become those who undertake a hopeless competition and those who drop out of the game. Those who stay in the game with the cards stacked against them respond to the policies of government with the means at their disposal. The City Building Commissioner in New York City was referring to these embattled resistors when he stated that the 10,000 horror structures in the city should be leveled if they cannot be kept in repair economically and the rest expropriated from "the hard-core slumlord, the real bad egg."[3] Implicit in this observation is that somebody must separate structures that are economically feasible. If government is not going to recognize the reasonable opportunity for landlords to make a fair profit after complying with governmental regulation, it must be prepared to face the hard-core slumlord as creature of its own creation.

When a neighborhood is first given intensive scrutiny under a housing code, a conclusion stands out that the problem centers on "slumlords." A study made in New Haven illustrates this condition. It showed that "owners in the slum landlord program accounted for 20 percent of a year's complaints, although the housing involved accounted for less than 2 percent of the housing stock."[4] It is both dramatic and relatively easy to attack this minority. It also supports and reinforces popular

[3] *The New York Times*, July 10, 1967.

[4] Elliot Segal, "Housing Code Enforcement Program directly aimed at Slum Landlords...", *Journal of Housing*, vol. 25, (No. 2, 1968), pp. 74 ff.

stereotypes. But it must not be overlooked that 80 percent of the complaints were outside the category. This article basically ignores the economic issue.

The corollary to this condition is an accumulation of abandoned buildings, called "walkaways," that constitute the residuum of those who have given up the game.

Administrators of housing codes in larger cities in the East and Middle West do not hesitate to observe that rigorous enforcement results in abandonment. The problem is not confined to New York City, although it is further aggravated there by rent control. Code enforcement and rent control are administered in one agency, but they are not subject to coordination under existing statutory law. A summary of what is happening in New York City may well be a prelude to a parallel condition to code enforcement without consideration of the economic impact on landlords.

With available information it is impossible to separate the causation of increasing numbers of walkaways into discrete categories. The four main elements are obvious. These are (1) fixed, inelastic welfare allotments that are compatible with public housing rates with their approximate 30 percent additional subsidy; (2) rent control based upon premises that ignore the realities of operating costs and fair profits; (3) increasing real estate taxes that are ignored by both welfare and rent control; and (4) code enforcement that ignores all three of the foregoing factors as well as the economics of the landlord-owner. Until these four elements, combined with exclusion of socially unacceptable tenants, in terms of peer values, are brought into conjunction with each other, housing code administration will continue to be little more than a factor in governmentally established confusion.

A not inconsiderable element in the equation relating to landlord economics, especially in large cities, is the role of vandalism, organized and otherwise.

An illustrative case, told by Commissioner Sidney Smith as "an incident which is typical of numerous other similar such occurrences happening in connection with abandoned buildings" in Chicago is quoted:

> An elderly couple who were owners of a substantial 2 flat building in which they had resided for many years decided to sell the structure. The sale was consummated and the original owners moved out of the neighborhood. Several years later, the purchasers defaulted in making the mortgage payments and waited out the redemption period of 18 months. During this time period the original owner made periodic visits to the property in order to be sure that same was in proper repair. One Friday, the purchaser decided to vacate the building and in the process removed some of the items such as stoves, which were a part of the property. The structure was left open and shortly, within a matter of hours, it was vandalized, stripped of plumbing fixtures, radiators and electrical fixtures. On the following Monday morning, a neighbor telephoned the Department of Buildings and filed a complaint that subject building was open and in a dangerous condition and an attractive nuisance. An inspection report verified the condition which was hazardous and warranted that action be taken to have the building demolished. A title search was instituted to determine ownership of the building and the title holders, the original owners, were notified to either make all necessary repairs or demolish the structure. Upon receipt of the notice the owners conferred with their son, and were puzzled because only several months before the father had checked on the building and found it in good repair. The son called the Department of Buildings and spoke to the building inspector who had been instrumental in the issuance of the notice. The son explained that there must be some mistake and that he and his father were sure that the condition described by the inspector could

> not be existing. However, after some discussion, the son was convinced that perhaps he should make a personal inspection of the property to verify the reported conditions. The next day he and his father visited the site and upon arrival, the father was so astounded and disturbed regarding the condition of the vandalized and stripped building that he had a heart attack while viewing the structure. As is the case in many such instances with reference to abandoned buildings, the City of Chicago secured a court order authorizing demolition of the structure. Subsequently bids were secured, a contract was let, and the building was demolished. Following the actions a lien for the cost of the work was recorded against the property.

In effect, what had been a family asset of some $25,000 had become a lien against a vacant lot for $2,500.[5]

Just how vandalism increases the overhead, in terms of rent costs, is beyond the range of information available in this study. Certainly it has impact upon landlord psychology and provides incentive to keep ''good'' tenants and contributes to the increasing screening of new ones. Widespread opinion among code administrators considers that vandalism is increasing in both private and public low-rental housing and that it is a factor mitigating against owners' keeping their properties in good condition.

Recently *The New York Times* carried a feature story that, while somewhat disconcerting, illuminates the complexity of the problem and the inadequacy of present methods of dealing with it. The mother of an alleged ''glue-sniffer'' lived with her family in a six-story building at 1165 Simpson Street in New York City. Owing to neighbors' complaints to the landlord about the association and activities of the glue-sniffers (who called themselves ''the Glue Angels''), the mother was ordered by the landlord to leave. ''When she did, the residents said, the teenagers vowed revenge and proceeded to take over vacant apartments.''[6] They ripped out plumbing, broke down walls, splintered window frames, smashed sinks, and broke windows.

When other tenants saw what was happening, according to the owners, 25 of the 56 families moved out. Depredations continued. The tenants remaining attempted a protective organization. They appealed to the police. The reported commentary of the police, true or not, is sinister in its implications. They noted a high crime rate in the precinct, but Captain John A. Ferrara stated: ''There's no gang in this area. The kids are playing there, making noise, maybe a ball breaks a window, maybe they run through the halls.''[7] The neighborhood organization is equipping itself with defensive weapons. Some of the men are staying home from work to guard their apartments; arrangements have been made for working on alternate days.

The owners claimed that they had put in almost $30,000 in repairs. When the depredations began they estimated the value of the building at $220,000. A mortgage of $45,000 had been somewhat reduced. They decided the situation was hopeless and gave the building to the superintendant, Mr. Nicholas Isquirdo. The tenants have joined the Citizens United Association to seek police protection. ''It is so bad that no one can go out of his apartment. If your apartment is left for five minutes they come in and what they can't take they destroy,''[8] stated the head of the new organization. No. 1165 Simpson Street is only a step or two away from abandonment as a result of a reign of terror and lack of effective countermeasures by the enforcement agencies of the city.

The growing problem of vandalism, particularly as related to vacant buildings or vacant apartments in buildings, is common to most large cities. It is aggravated by code enforcement. Further research directed to more effective coordination of protective systems is clearly indicated.

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[5] The quotation is from a letter dated August 7, 1968, to the investigator from the Commissioner of the Chicago Department of Buildings, Sidney D. Smith; the economic effect noted is based upon an interview with the commissioner in Chicago.

[6] Article ''Bronx Glue Angels Fly High,'' under the name of David K. Shipler, in *The New York Times*, August 3, 1968, p. 23.

[7] Ibid.

[8] Ibid.

What might be called ''contingent abandonment'' has recently been evidenced on a substantial scale in Detroit. A Mr. Albert Goodman, said to have been the ''biggest landlord'' in the city, turned over 17 buildings to a ''Negro tenants' union'' that had been pushing a rent strike. The chairman of the tenants' union has acquired ''full power'' to manage the 1,100 apartments, collect rents, evict tenants, pay expenses, and make repairs or improvements. Seventy-five percent of ''net income'' above operating routine expenses can be used for repairs or improvements. The Goodman interests are to receive the other 25 percent. Since the income split is made after deducting operating, managerial, supervisory, supply costs, mortgage, insurance, taxes, and any costs resulting from breakdown of the operational system (such as boilers), the chances of Goodman's receiving a profit are slim. Mr. Lyles, the tenants' union chairman, said ''Goodman was really losing money on these buildings.'' Mr. Lyles announced that he will improve the buildings and that rents will not be continually raised. It might be added that Mr. Goodman ''has been selling off his holdings since early this year.''[9] It is a somewhat curious consideration that only a few days before the Goodman-Lyles contract, the Michigan Legislature added what has been called a ''tenants' rights'' amendment to the housing code system.

Interrelations of Code and Rent Controls

Over half the families in New York City live in rent-controlled or governmentally subsidized housing. Politically, this means that the cards are stacked to ensure continuation of an artificially price-setting program against which private capital investment in housing for the poor must compete. What happens? In Brownsville, Brooklyn, ''Row after row of apartment houses—modern brick and masonry structures as well as older tenements, have sunk into decay. More than 500 buildings have been completely deserted. Whole blocks are silent; only the sounds of glass crunching underfoot and the gurgle of water from vandalized pipes echo through the burnt-out hulks.''[10] According to a resolution introduced into the New York City Council on July 2, 1968, there may be 12,000 abandoned buildings in the city that have been lost to the tax rolls through abandonment by their owners.[11]

Whatever the number of buildings abandoned by their owners because it was cheaper to abandon than try and operate them, it should be noted that no governmental agency or policy participates in the determination that abandonment is less in the public interest than either condemnation under eminent domain power and public operation or the provision of some subsidy to make operation reasonably profitable.

While abandonments accumulate, New York City finds insurmountable housing shortages. During the last winter, 22 adults and 40 children moved or were moved from unheated homes to a Harlem armory. Once there, the problem of relocation had to be considered. Nearly as many as remained were talked into leaving; the remaining 52 resisted moving until assured of ''decent housing.'' The city's Relocation Department reported that it had found other quarters for the families either in hotels or in standard housing.[12] The city tried to obtain an eviction order from the family court on the basis that parents were neglecting their children by remaining in a semicamping condition. The court threw out the case on jurisdictional grounds.

One cannot help but wonder why a city, and its sovereign superior governments, offers to pay hotel rates for poor families when hundreds or thousands of buildings designed for people to live in stand abandoned. The role of public housing is emphasized when Mrs. Sims, assistant director of the Community Council on Housing is quoted as saying: ''I'm not going to let the families move until every single one is put into public housing.'' Who were the derelict families? ''Most came from houses or apartments lacking heat and hot water—some of the families were 'emergency vacate' cases, who came from such substandard housing that the city did not attempt any repairs but instead sought new accommodations.''[13] For all practical purposes this statement indicates that there are buildings that have been abandoned by the city as far as code enforcement is concerned but that are still lived in by tenants.

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[9] *The New York Times*, June 28, 1968, p. 46.

[10] *The New York Times*, March 7, 1968, feature article on Brownsville, p. 3.

[11] *The New York Times*, July 3, 1968, feature article by Charles G. Bennett, p. 35.

[12] *The New York Times*, Feb. 17, 1968, p. 1.

In June 1968, William A. Mose, president of the Urban Study Associates, made a tour of poor districts in New York City. He blamed the city ''for policies that made it financially impossible for owners to prevent deterioration.'' A local leader announced that landlords cut off the services when Negroes and Puerto Ricans moved into the Brooklyn area and that the city was responsible for not taking action against the owners. While the tour was in Brownsville a resident muttered: ''they came to see the animals in the zoo and now they're going home.''[14]

Taxes

Morris M. Greenstein, an owner who said he had abandoned a building this year, undertook an explanation for his action. He was unable to pinpoint any single policy, but his building was on old rent-controlled structure. He stated that he had been forced into a choice; abandon the building or go into foreclosure to mortgagees, who themselves would abandon them. He said: ''Since 1966 the city doubled water and sewer taxes and raised real estate tax rates and assessments. There is vigorous code enforcement. A tenant on welfare doesn't have to pay rent if there are violations in the building. With rents fixed in a controlled building and mortgage and tax payments regularly due, the owner is caught in a squeeze that he cannot survive.''[15]

Abandoned buildings, eventually, accrue to the city because of tax delinquencies. In February of this year the city held an auction. The previous owners came to see the end of their interest and provided considerable disturbance ''as their angry cries drowned out the auctioneer's voice.'' The city is trying to prevent accumulation of abandoned buildings. It offered 20-year mortgages to prospective buyers, at a rate considerably under the free market. It requires a down payment of only 20 percent when sale prices exceed $1,000. Under these terms it sold 72 of 123 properties. The ''value'' of a six-story building is difficult to determine, when special inducements are made to get it off the city's hands. The unsold properties did not attract bids that equalled the ''upset'' or minimum price fixed by the Department of Real Estate which had advertised special bargain prices to attract small buyers.[16] One might reasonably ask: What happens to those buildings that are unsalable? Another pertinent question is: How does the sale of property under mortgage terms that amount to subsidization affect property values in the vicinity for tax purposes? How is the six-story apartment building sold by the city for $19,300 assessed for tax purposes in the hands of the new owner?

It is beyond the scope of this commentary to make independent analysis of the impact of ''Mitchell-Lama'' upon unsubsidized housing taxes and operational economics. The nature of the effect can, however, be surmised from observation of the facts. Under the state statute, a qualifying sponsor receives a 50-year mortgage for 90 percent of the development cost. He receives a 50 percent tax exemption in New York City. This continues, or may possibly be increased, to as much as 80 percent, for up to 30 years. To further sponsorship, an assurance of 6 percent profit is provided. Hence, when costs of operation rise, rents are set by the government to ensure the 6 percent profit and an accumulation to meet mortgage payments. It follows that an increase in taxes, even if only half of private taxes, is passed on to the tenants. Since this system operates, even though it further increases real estate burdens on nonsubsidized housing, perhaps it could become a measure to determine rent increases generally. The administrator of the Mitchell-Lama program in New York City, Dr. Frank Kristof, recently stated: ''The magnitude of some of the cost jumps astonishes me. Operating costs are completely running away with us.''[17] Representatives from the city to the New York State Legislature sponsored legislation permitting the city to increase Mitchell-Lama projects' exemption from taxation to 80 percent. Higher exemptions in poorer areas have been suggested, Dr. Kristof noted.

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[13] Ibid.

[14] *The New York Times*, June 22, 1968, feature article by Joseph P. Fried.

[15] *The New York Times*, April 20, 1968, p. 19. Feature article under name of Joseph P. Fried: ''Owners show abandoned tenements.''

[16] *The New York Times*, Feb. 15, 1968.

There are some 34,000 apartments under the Mitchell-Lama Law in New York City. Even with the subsidy program including 50 percent tax abatement, the city has found it necessary to increase rents under a formula that makes the average rent increase about 15 percent. It would follow that private, unsubsidized, and fully taxed structures are caught in an even more critical bind. Unless welfare, as the dominant element in the low-rent field, increases its allotments for housing to correspond with the increases documented under Mitchell-Lama and exceeding 15 percent, the abandonment rate will normally be expected to rise. At the same time that rent increases are proposed for Mitchell-Lama housing, increases are proposed for low-rent public housing. ''Increased expenses, particularly for maintenance, have created a $5 million deficit in the Authority's Budget.''[18] Chairman Walsh considered that the only way to close the gap is more state or Federal subsidy, the outlook for which is not bright.

For obvious political reasons there is reluctance in a public agency concerned with fixing rental rates to raise rents to meet rising costs. This applies both to public housing and semipublic, subsidized Mitchell-Lama units. While public housing was running a $5 million deficit, Mitchell-Lama ''middle-income'' housing has been getting into serious trouble. Jason Nathan, Administrator of Housing and Development, has asked the Board of Estimates to grant increased tax relief for 12 projects that face particularly severe financial pressure. If this is done, the burden on other properties is correspondingly increased. ''Tenants in a number of rental and cooperative middle-income projects have vowed to withhold rents to protest the rising cost of middle-income housing.''[19] Mr. Nathan assured tenants that increases in rent were made only after an ''exhaustive'' review of the financial situation in each of the 26 projects. ''This is a very serious thing and we are concerned about emotions carrying the day.'' He noted that in the case of cooperatives the failure to pay carrying charges ''could endanger the housing company and put a cooperator's own equity in jeopardy.'' It must be added that the crisis condition is a result of delay in meeting rising costs through the years, but finally: ''If the city doesn't face up to its responsibility and operate the program in a sound manner, the attractiveness of our bonds and notes would be placed in serious jeopardy.''[20] Perhaps the city could join the other landlords in a ''walkaway.''

Private owners of rental properties are not unaware that the city recognizes the validity of rent increases that come under its control as public housing or Mitchell-Lama projects. The Adelmaye Realty Corporation of Manhattan, owner of an apartment building under rent control, initiated a suit in the State Supreme Court. The recent increase in the ceiling interest rate on mortgages was one item that added further differential between the sponsored housing and open-market-financed units. The plaintiff argued that the same rising expenses that warranted increase in Mitchell-Lama rentals apply also to private housing, and yet private landlords ''were discriminated against because the same agency that increases rent for Mitchell-Lama developers does not do so for the private landlords under its jurisdiction.''[21] The official sense of justice in New York City provides for a 6 percent return on assessment values under rent control but does not take into account mortgage payments, whereas Mitchell-Lama housing entitles the developer to 6 percent over and above operating costs that include mortgage-interest payments.

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[17] *The New York Times*, Feb. 14, 1968, under the name of Steven V. Roberts.

[18] Ibid.

[19] *The New York Times*, April 24, 1968, page 1.

[20] *The New York Times*, Page 13, ''Long Island Landlords Deny Slum Charges,'' under name of Roy R. Silver, August 3, 1967, early edition.

[21] *The New York Times*, June 14, 1968, p. 35.

Mr. Frederick Berman, Commissioner of Rent and Housing Maintenance, announced some carefully limited removals of rent controls on apartments renting for $250 or more per month to take effect in a staggered pattern starting October 1, 1968. Apartments with large families (four or more people) ''will be exempt from any decontrols or rent increases as long as that family unit continues to live in the apartment,'' he said. No explanation was given why a landlord should be expected to contribute to larger families, who normally provide greater hazards and higher upkeep problems.

A somewhat typical recognition of the relationship of tenant-created violations and family size, was made by John Hildebrandt, Acting Commissioner of Urban Improvement in Syracuse, concerning reported violations: ''From the nature of the violations, any or all of them could have recurred in almost a year's time. Where there is a large household, this is not unusual in six months time.''[22]

It must not be surmised that the action of Mr. Berman represents a concern for the landlords. This he made quite clear. His reasoning does not explain why there are thousands of abandoned buildings, a condition that is probably the greatest contributing factor to housing shortages in the city. He said:

> one of the built-in factors in the law is that when there is a vacancy rate of more than 5 percent in any category of apartments, you must decontrol the category. This is why we are forced to decontrol the apartments over $250 at the present time. This is not discretionary; this is mandatory under the law.[23]

The rent control program had its beginning in 1943 and ''is a so-called temporary measure; is used only when there is an emergency and a shortage.''[24] The census figures of 1965 showed that there was a vacancy rate for apartments over $250 of about 8.81 percent. Why it takes 3 years to find this out is unknown.

Rent control in New York State, outside of the largest cities, is administered by Robert E. Herman. The way Mr. Herman goes about his task seems to impose housing code standards without the necessity of enacting the code at all. In the Town of Hempstead, Mr. Herman, acting on information supplied by a building code inspector decided that occupants of housing were ''overcrowded, and the house dilapidated, unsanitary or dangerous.'' One house, occupied by seven families, according to the building inspector, allegedly paid $960 per month in rentals to its owner, a Calvin Tann. But Tann's lawyer contended that the building was rented to one tenant, a Dorothy Bennett for some $200 per month. She apparently subrented and made the $760. Mr. Herman reduced the rent payable to Mr. Tann to $1.00 per month. Just how this accomplishes a public interest seems mysterious. The owner is penalized for violations beyond the competence of the official to interpret, for actions over which the owner-landlord has no control or responsibility. Mr. Tann's lawyer offered to eat Mr. Berman's hat if he could show that more than $200 per month went to Mr. Tann.[25]

In seeking to illuminate this problem, Mandelker formulated the issue as follows:

> Consider this situation: Owner has a large apartment house containing many large apartments. In order to meet the rent, most of the tenants in these apartments have let single rooms to individuals, and in some instances to two or more individuals. As a result, if the single rooms are considered as dwelling units there are many violations of the

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[22] *Syracuse Post-Standard*, July 31, 1968, p. 8.

[23] *The New York Times*, January 29, 1968, p. 35, under the name of C. Gerald Fraser.

[24] Ibid.

[25] *The New York Times*, Aug. 4, 1968. Feature article under the name of Roy R. Silver.

> housing code. There is not even an attempt to comply with the various health and other requirements of the rooming house code. However:
>
> (1) Owner cannot evict the roomers under the landlord and tenant act of the state because there is no landlord and tenant relationship between the roomers and the tenants. In any event, the standing of the landlord to evict a subtenant is in doubt. While all of the tenants can be evicted, and with them their roomers, there is no guarantee that the situation will not be repeated by the new tenants.[26]

In another case a quite different problem appeared. The owner, a Mrs. Grant, found her rent income reduced from $140 to $30 per month because it was tenanted by more than one family and was said to be out of repair. Her plea was: ''Rent from a one-family house is not enough to pay the taxes. What do they want me to do? If the state wants the house they can have it. It's not worth the headache.''[27]

It is not clear whether the Nassau County case involved both housing and building codes; for the purposes involved it is not important. The rent control program takes code standards, apparently, as the criteria supporting its action. An interesting result of the way the problem developed was its impact upon the County Executive, Mr. Nickerson. He took official notice that a relationship exists between home improvements and tax assessments. He announced that he will seek legislation to allow the County Board of Assessors to give owners of such single-family homes a 10-year ''assessment freeze'' on the value added by repairs and improvements. Mr. Nickerson added that owners of more than 14,000 dwellings considered dilapidated or deteriorating are reluctant to make improvements, since their taxes increase proportionately to money spent for such expenditures.[28] He did not add that, to qualify, a taxpayer should let his property run down, get his assessment cut, and then fix things up if a promise is made not to raise the taxes for 10 years. Nickerson's recommendation does not seem to solve the problem.

The consideration of problems centering in New York City and suburban areas should have two items added. The first is that the State Health Department has adopted, subject to county government approval, a section of its Sanitary Code which, if adopted by a county, will give clearer standards against which enforcement action can be undertaken. The second relates to New York City. A new consolidation of code enforcement and rent control has been made under the auspices of Mr. Jason Nathan, in which Mr. Berman can work out some coordination of programs that have, to date, seemed excessively independent and without concern for seeking solutions for economic hardship cases.[29]

The Slumlord Stereotype

The politically established, popular stereotype that a small number of profiteering landlords dominate the low-rental housing in cities stands on quicksand. In the summer of 1966, President Johnson announced steps he would take to protect the urban poor from ''profiteering and injustice.'' Vice-President Humphrey reiterated the party line when he asserted that ''slumism'' is the number one challenge in America. Talking to 2,500 delegates at a Congress of Cities in Boston, he pointed his finger at the assemblage and said: ''If you gave out as many tickets to the landlord who breaks the housing laws as you do to the fellow who drives downtown and overparks, you'd have a different kind of city.''[30]

George Sternlieb, in *The Tenement Landlord*, has attempted to come to grips with the facts. In what is one of the few recent serious attempts to find out who owns slum housing structures in Newark, he concluded that the idea of a small number of the landlords owning most of the slum holdings is not the prevalent condition. Large owners do own a proportion of the slums, but the degree of concentration has been and is overstated. Interviews with owners of nearly 400 parcels of slum property in Newark resulted in the finding that over 40 percent of them were in possession of landlords who owned no other rental property. Less than a quarter were owned by landlords possessing over six parcels of this type property. Less than 20 percent were in possession of owners who thought of themselves as securing three-fourths or more of their income from real-estate holdings.[31]

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[26] Daniel Mandelker, *Managing Our Urban Environment:* Cases, Text and Problems. (N.Y. Bobbs-Merrill: 1966) 680, 681.

[27] *The New York Times*, Aug. 4, 1968. Feature article under the name of Roy R. Silver.

[28] Ibid.

[29] *The New York Times*, Jan. 29, 1968, p. 35.

[30] *The New York Times*, August 1, 1967, p. 18.

Sternlieb decided that of slum landlords, the ''amateur kind of holder...predominates in the market.'' He also noted that many of the owners interviewed were owners by default, not purchase, through inheritance, lack of purchasers, or a trivial investment that was not meaningful in terms of total capital income.[32] The owner-occupied apartment house was a not insignificant element in ownership of of parcels. These small operators can contribute their own work, and a significant number have mechanical skills and can reduce out-of-pocket expenses. They are usually dependent upon rental income for subsistence. In Sternlieb's study, 36.6 percent of the parcels examined were owned by occupant landlords.[33] A considerable number of these were Negro families. There was some evidence that Negro ownership was increasing and that this might be a factor in stabilizing the neighborhood.

Leo Grebler included a chapter ''Who Owns the Slums?'' in his book *Housing Market Behavior in a Declining Area.* His data were collected from New York City's lower east side. He found that in 1900, 72.8 percent of residential properties were owned by individuals. By 1950 this percentage had declined to 31.3 percent.[34] The difference was accounted for by an increase in corporate ownership. He considered that the decline in individual ownership had been relatively consistent during that period and that corporations specializing in realty holdings, rising from 0.4 percent to 40.3 percent, had increased the most. Writing in 1952, he said: ''if concentration is defined as a tendency for identical holders to own large numbers of parcels in the area, the records suggest that there is no widespread concentration of private ownership at the present time.''[35]

The problem of ownership, trends, and economic conditions has not been adequately studied to warrant exact conclusions. An observation made by Stegman seems especially cogent: ''The lack of concern for existing owners of the low-rent stock (of housing), however, is particularly puzzling since there is a great deal of interest at higher levels of government in encouraging widespread rehabilitation efforts.''[36]

In comparing New Jersey cities—the site of Sternlieb's study was Newark--and New York City, it is important to recognize that New Jersey cities are not under rent control. Sternlieb came to a conclusion that is reinforced by research in this study. The full-time real estate owner, deriving his living from rental properties, should be encouraged and regulated to permit ''reasonable'' profits. He can bring skilled maintenance and upkeep mechanics, estimators, and contractors into operation with greater efficiency than the typical small, or especially the amateur, small landlord. He will, for reasons of economic interest, be responsive to code enforcement to protect his investment and livelihood. It is only when governmental policies make profit and investment future incompatible with compliance that the large-scale operator neglects his properties and allows depreciation leading to final hopelessness. In other words, the ''slumlord''—both the minority reality, and the stereotype—as a large-scale operator, is the creature reflecting short-sighted, crusading, political reaching-out for tenant votes. Once stereotyped, he is the whipping boy of demogogic political leaders. In the last analysis, it is the poor who suffer and in their helplessness repudiate the dominant societal system with its false leaders.

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[31] Sternlieb, op. cit., pp. 121 ff.

[32] Ibid., pp. 127, 128.

[33] Ibid., p. 131.

[34] Leo Grebler, *Housing Market Behavior in a Declining Area,* (1952), p. 97. N.Y. Columbia Univ. Press.

[35] Ibid., p. 104.

[36] Journal of the American Institute of Planners, (Nov. 1967), a book review, p. 419.

The lack of material is underscored by a statement in a letter to the author from the housing program coordinator in Baltimore that ''we have no studies that deal with property ownership trends.'' July 23, 1968.

Effective code enforcement cannot be realized as long as the ''whipping boy'' theory dominates urban, political values as evidenced in national and many local policies. The current policy is little more than a modern form of witchhunting.

The basic question in housing code enforcement that takes priority over all others is this: Does vigorous and successful code enforcement reduce or increase substandard housing? The question has greatest significance in the larger cities, but it is one of degree and may not appear until the early phases of enforcement have passed. Most of the larger cities have already passed through this early phase, which is something of a honeymoon period in which public opinion is confused and unsettled and housing code administration is just one of the elements that come in the package called ''workable program,'' a package that comes with Urban Renewal project money from Washington. When the glamour of the witch-hunt against slumlords wears thin, the validity of housing code enforcement should rest upon solid understanding and democratic support. Its effectiveness is impaired if it continues tied to the urban renewal package.

The question of the relationship of housing code enforcement to reduction of substandard housing is being studied in New York City. This city is not fully comparable with other cities; for one reason because it has rent control as an element that cannot be filtered out of evaluation results. This element does not, however, invalidate the nature of the tentative findings available from the study at this time.

As in most larger cities, the population of New York City is declining. This, however, does not support a conclusion that building of housing units has been seriously curtailed. New housing units completed between 1947 and 1961 averaged some 31,000 per year.[37] But between 1962 and 1965 the average jumped to 52,000 annually. The city's net inventory of housing units was thereby increased by 186,000. During this period an estimated 116,000 new family units were formed. This means that the city's vacancy supply was increased by about 70,000 units. In what might be termed ''classical'' housing theory, these figures should mean that rent control is no longer needed and that housing code enforcement could proceed without danger of shortage of suitable housing facilities.

The findings of Dr. Kristof, however, do not tally with the theoretical expectancies:

> Unfortunately, the market does not work in such an orderly manner... tens of thousands of vacancies began to appear in other sectors of the housing inventory, many in the form of vacant and abandoned buildings scattered throughout the City. ... And in those sections of the City where they have been concentrated, the result included some severely destructive side-effects.[38]

The situation in Brownsville, previously discussed, is one of these concentrated areas. Kristof and his staff,

> discovered to our dismay, however, that the abandoned building phenomenon is not limited to decaying areas and obsolete buildings. This process also has encompassed perfectly sound, solid elevator-buildings built to modern standards in the 1920's. ... Evidence exists, however, that some portion of the abandonment process may constitute much more than the normal market process. ... As a consequence, a full-scale investigation into this snow-balling development has led to investigation of concentrated code-

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[37] The statistics in this paragraph are from an address given by Dr. Frank S. Kristof, of the City of New York Housing and Development Administration at the Meeting of the American Statistical Association at Pittsburgh, Pa. on August 20, 1968, p. 6.

[38] Ibid.

enforcement activities of the City as well as punitive rent control actions. The inquiry currently underway is designed to ascertain to what extent a program of intensive code enforcement (cellar-to-roof inspection of every multi-family structure in a neighborhood) designed to induce owners to eliminate code violations, actually has had the reverse effect.[39]

"In Memoriam"

A somewhat different kind of review of the history of a building like Klein's ''311'' might run something like this. It might have happened in Brownsville or almost any of the larger American cities. The hypothetical building is in a neighborhood in marginal middle-class areas. It is not far from an area that is marked for ''urban renewal'' demolition. The threatened poor are in normal flight as part of the program. The marginal middle class feel the pressure and see the beginning of movement away of neighbors as a kind of handwriting on the wall. There are just too many people being dislocated to make the ''normal'' slow depreciation likely to continue, and one must always think ''of the childrens' education.'' The movement away increases, and for sale and for rent signs clutter lawns or doorways. What can a landlord do? Should he join the throng or stay put and try to live with the incomers? If he sells, another landlord takes his place; if the sale was without marked depreciation the new landlord starts with a capital expenditure that will require a certain balance between rents, maintenance, and taxes to make the enterprise a successful business venture. If the original landlord stays, he finds that his incoming tenants are bound by inelastic and fixed incomes that are the typical mark of welfare poor. He faces arrearages and late payments and cannot increase prices.

As a business man he tries to preserve the capital value of his investment and maintain an approximate return. He may undertake to convert or split his apartments. But the code requires a bathroom for each new unit, and the old units are made smaller as space is made for possible new dwelling units. He may close his eyes and permit ''crowding,'' but again he faces code restrictions. If the code administrator closes his official eyes, at least low-rent payers are off the streets. If he holds to the letter of the law, the landlord may be in serious trouble. With his new tenants, crowding or not, he finds maintenance costs rising. No hope seems on the horizon for the foreseeable future. The normal impulse, and reasonable expectancy, is to cut down on repairs and maintenance. This will not be reflected in serious loss of tenants, and the building has already been depreciated in the open market so that the deterioration is relatively inconsequential.

The landlord examines his economic position. If he has substantial mortgage payments to meet and taxes to pay he may find that the difference between rental income and necessary outgo is not sufficient to meet builders' liens that would be a necessary condition to code compliance. An impasse has been reached. It is possible that the alternative is receivership with little or no chance of recovery, or abandonment. In the last throes of despair the landlord naturally squeezes every last cent he can manage from his vanishing investment values.

While this story is being enacted in one block, a landlord in the next block, which has been included in an urban renewal project area, sells his somewhat similar building to the government at a price reflecting its market value when our story starts. He is protected by the Constitution; he has had his property taken by eminent domain. Our hapless landlord has also had his property ''taken'' by the same Constitution; citizens can move freely without discrimination. Is it possible that the hapless landlord is held responsible for the deterioration of the neighborhood and the inmoving of the displaced persons from the next block? But who can gainsay the poor's right to expand the cluster rings around the ''progressive'' redevelopment of a great city?

Even the contemplation of code enforcement under the police power seems to raise questions of public integrity and simple honesty. It is a sad monument to governmental planning that is on public view in Brownsville and to a lesser extent in nearly every city in which code enforcement has been stepped up to protect the rights of the poor.

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[39] Ibid., p. 7.

After our hapless landlord, or his successor who took over with little or no cash outlay, finally walks away and the city has another item of ''public housing'' on its hands or an abandoned hulk, depending on just when the landlord left, the city makes at least token efforts to get the building back on the tax rolls. It offers inducements, lower taxes, lower interest payments on longer mortgages. Sometimes it sells the buildings as the previous owners quite literally vent their rage in yelling ''sucker.'' This is some of the most dramatic governmental planning of our generation and represents a little discussed aspect of the new federalism.

Chapter 6

HOUSING CODES: OWNER-OCCUPANT

Housing codes are enforced against three different categories of potential violators. The first, most numerous, and probably the most difficult category to bring into compliance are tenants, especially the low-rent-paying ones. The second category, of by far the greatest official concern, are the landlords, especially those associated with low-rental housing. The third category includes the owner-occupants, especially those in one- or two-family dwellings. It is to these that attention is now directed.

Code enforcement, if vigorous, is considered by many to be an unqualified evidence of the public good. There may well be justification for taking a second look at this premise. Certainly there is less reason to resort to force against owner-occupants than against either of the other categories. The great majority of owner-occupants will respond to intelligently explained requirements to keep structures and facilities in repair, at least if there is some demonstrable relationship to health or safety. This condition, however, must be qualified by the fact that people who have shown the qualities normally associated with citizenship by managing to own a home may face adversity or old age with depleted and fixed incomes that are not flexible enough to meet repair costs.

Some local jurisdictions have excluded owner-occupants, in single- or two-family dwellings, from coverage by housing codes, completely or by restricted coverage. HUD has considered this digression from urban righteousness of sufficient magnitude to warrant termination of funds for urban renewal projects. HUD has not, at least so far, distinguished violations that are little more than mala prohibita in the interest of appearances, amenities, and conveniences from those that are seriously involved with health and safety. The penalty seems oddly high, especially in an agency that considers it normal to pay market value for a building in one area while insisting upon code enforcement with a vigor to destroy the values in a nearby site.

HEW has experimented in seeking cooperation with states or local governments to prevent welfare clients' being forced to sell their homes[1] or be turned out into the streets because they cannot afford code compliance expenses.

Among the housing codes that have excluded the owner-occupied homes is Glen Cove, New York. As previously mentioned a number of county codes apply only to rental premises, among them Howard County, Maryland, and Van Buren County, Michigan.

Some codes exempt the owner-occupied home from certain of the code requirements. Little Rock, Arkansas, includes the following statement in the section on Minimum Standards for Space, Use and Locations:

> 306.6 Single Family Dwellings: The Board of Directors finds further that healthful and sanitary conditions in relation to space, use and location generally prevail in single family dwellings occupied by one family only. Therefore, the provisions of subsections 306.2, 306.3, and 306.4 (Required space per occupant; required space for sleep-

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[1] The *Journal of Housing*, vol. 23, No. 8, Sept., 1967, p. 456, makes note of "a pilot program of increased shelter allowances is already being conducted in Baltimore under HEW auspices."

> ing rooms; and ceiling height for habitable rooms) shall not be applicable to single family dwellings occupied by one family only. For the purpose of this sub-section a ''single-family dwelling'' means a dwelling containing no more than one dwelling unit; and a ''family'' as herein used means husband, wife, children and mother and father of the husband and wife.[2]

Even nearly impoverished owner-occupants of single-family dwellings do not sit idly by while their homes deteriorate. Limited by skills and resources, their normal inclination is to fix what they can and use outside help when it can be afforded. With supervision and help they can do more. During the administration of Commissioner Wolff in Detroit a service branch of the building department was developed to give advice to ''do-it-yourselfers.'' Some fears were generated with labor unions, but the program evidences an approach that deserves further elaboration. In a ''Federally Assisted Code Enforcement'' (FACE) program in San Francisco, architecture and architecture students offered free services to homeowners to design, plan, and advise on needed repairs. Housing code inspectors referred homeowners to the service; some came in on their own as the word spread.[3] Other cities have provided similar services one way or another. Milwaukee's Housing Clinic, for example, gave similar advice but added help in selecting contractors.[4]

A problem that develops from trying to help owner-occupants, or small landlords, is the protection of the contracting function to ensure reasonable charges and competent workmanship. People in old age, and others seriously handicapped, are hardly in a position to evaluate the ''reasonable cost'' of work to meet compliance standards. Neither is it competent administration to assume that incompetent work is the fault of the owner in such cases. This means that somebody, housing code administrators probably being most eligible, should police the construction contract to meet standards. In recognizing the problem and attempting a solution, an interesting approach was tried in New Orleans. The Division of Housing Improvement drew up a ''Fair Practices Code'' seeking protections to ensure that contractors would not undertake jobs that they were unprepared to perform and that they would provide workmanlike results. The Better Business Bureau in the city undertook to provide a list of approved contractors with the sanction that dishonorable conduct would result in a contractor's having his name removed from the list. A three-member mediation board was set up. The reported results indicated that some success had been attained but that the problem had not been satisfactorily solved.[5] The item is presented in the hope that further experimentation, with greater reliance upon official action, will be stimulated.

It is not without some justification that citizenship and home ownership are associated. Probably this perspective motivates the 1968 Housing Amendments above all others. There is more than sentiment in the attempt to make home ownership possible and public policy. Stigma still attaches to ''going on welfare,'' and when an old or handicapped family must dispose of the last physical vestige of visible status as a condition to welfare support, the system unduly confuses both the family and itself.

Of some importance is the fact that housing code administrations have been given authority, and have a responsibility, to determine repair or other costs related to bringing substandard structures into code compliance. When one considers the complexity of this assignment it obviously cannot be competently performed by available staff in most of the small administrative units that HUD has brought into being. But in an almost negligible number of units the problem is competently confronted. In Baltimore the category of ''estimator'' has developed, and the estimator is part of an inspectional team that includes the housing inspector and an electrical inspector.[6] The program is consciously designed to give ''homeowners advice on where to come for services.''

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[2] Little Rock, Ark., ord. No. 11,422, sec. 306., 1963. Midland, Michigan, has a similar provision in its 1966 code.

[3] *Journal of Housing,* vol. 24, No. 10, (Nov. 1967), p. 571.

[4] *Journal of Housing,* vol. 21, (Sept. 1964), p. 408.

[5] *Report on the Contractor-Owner-Tenant Mediation Board,* a pamphlet, Division of Housing Improvement of the City of New Orleans, 1957.

A Social Security Amendment, 1967, provided an interesting and potential approach to the problem of the incapacitated home owner. This legislation goes beyond the aged and includes the disabled and blind. A memorandum to ''housing code specialists'' from the National Commission on Urban Problems summarizes the amendment as:

> Sec. 209 of the Social Security amendment of 1967 which for the first time authorizes an amount to be included in welfare payments for repairs to a home owned by a welfare recipient. The federal contribution is limited to $250 and must be matched 50-50 with non-federal money.

When repairs are made, or additional facilities provided to meet code requirements, the problems of tax increases and insurance costs are inherently related. Would it be unreasonable to expect housing code administrators to be given responsibilities to seek adjustments or provide avenues to meet such matters?

The effect and impact of the Social Security Administration's action under this legislation is uncertain. We found only one reference to this problem in our analysis, but realization of its importance did not appear until the study was well along. In Dade County, Florida, the initiative is taken by the Housing Administrator. The competent coordination of policies in this county results from the effectiveness of the county manager's policy perspectives. The amendment assumes that ownership and welfare subsidy are compatible, but it is not clear that subsidy is available at the time a family goes on welfare. Certainly the subsidy is available only for those on welfare. In some cases the availability of the repair on compliance subsidy might postpone, for an indeterminate time, the necessity of acquiring dependency status. If health expenditures can be made without unnecessary loss of dignity, there is no reason why housing expenditures should not be covered in a similar fashion.

In the discussion of the effective use of persuasion, mention was made of a program in Evansville, Indiana, in which city council appropriations were used to meet owner-occupants' necessary repairs as an alternative to eviction.[7] It is in smaller cities and especially outside cities that the problem of the owner-occupant becomes proportionately more important. It must be reiterated that substandard housing, relatively, is more of a problem in the non-urban areas.[8] The HUD programs have been, at least until recently, focused in the urban slum and its elimination. Emphasis has been in preventing or ''conserving'' the best areas and ''rehabilitating'' intermediate segments that appear to be responsive.

An almost universal problem is illustrated by reference to Sioux City, Iowa. The senior citizen, especially when pensioned on a fixed income, can find himself unable to comply with code provisions. With no special subsidy available, T. E. Corothers describes one way of attacking the problem:

> The senior citizen who has lived in a home for forty years or longer and now has only a pension income is a special problem. We handle this problem by keeping an ''open file'' on the property until such time as the individual passes away, moves to a nursing home, or goes to live with some member of his family. At that time we then insist that the property be brought to standard. Conditions of extreme hazard must be corrected when found. ...[9]

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[6] Baltimore, Housing Division Annual Report, 1966, p. 9.

[7] R. Anderson, ''Code Agency....'' *Journal of Housing*, vol. 22, 1965, p. 149.

[8] See footnote No. 3 in chapter 1, p. 2.

[9] Letter to author from the health director, June 4, 1968.

Code enforcement, under such conditions which are common, leaves dangling the question of effective policy in cases of extreme hazard. The problem presents a matter that has been too lightly treated.

Another approach to the problem of the elderly homeowner with little income was noted by the executive secretary of the Evansville Redevelopment Commission:

> Whenever our Housing Inspectors run across a piece of owner-occupied property that is the home of an elderly widow or couple that have neither the financial means nor the relatives to assist them in making necessary repairs to their home, we have been able to interest various community organizations in assisting these homeowners. When one of these cases is brought to my attention by our Housing Inspectors, I normally contact either the office of our Council of Churches; the Catholic Community Center; or the Community Action Program Office. These offices are normally aware of organizations, churches, or individuals who are interested in helping the elderly home owners. In addition, I frequently receive telephone calls from people in the community who are interested in what they, or their Sunday School, or some like group, can do. Just recently, a Sunday School Class, comprised of a group of teen agers, demolished two dilapidated sheds, and a dilapidated fence for an elderly widow. On this coming Saturday, a group of people from an experimental ''floating'' Catholic Parish will paint a house for an elderly widow that does not have the funds or means to otherwise accomplish this work.[10]

Evansville is a city of some 150,000 people. It has not reached the massive impersonal characteristics of large metropolitan centers. Few large cities have neighborhood organizations reflecting the humanitarian concern and willingness to pool common effort.

However, the possibilities suggested in the program administered by Raymond Anderson are significant for others seeking stimulation to community and neighborhood programs, whether they have government backing or are entirely local creations.

Housing codes are written with an unwarranted presumption that all provisions are critically related to health and safety. This association pattern makes absence of ''degrees'' of seriousness a difficult issue. The approach in Sioux City, and practically everywhere else, assumes the relativity of provisions. But it is legally difficult to make ''reasonable'' subclassifications when all items are equated alike. Even an honest and well-intentioned attempt to escape uniformity in application for reasons of area differences, or human situation differentials, runs head on into issues that can be evaluated as ''discrimination'' or ''inequality.'' Whether administrators face this issue openly or covertly, it cannot be avoided.

The use of loans, under Federal, state, local, or private auspices, is not worth extensive discussion, unless the loan is a lien on the property and can be satisfied upon death of the owner or disposition of the property. Grants are the only way short of eviction. At least greater concern should be given, to both the economic and humanitarian aspects of the problem. Now that housing code administrators have acquired at least nominal competence to determine values of structures and compliance costs and can be depended upon to exercise a degree of discretion, legal or illegal, to accomplish the public interest, an opportunity should be pursued to bring about a reevaluation of this problem.

In Howard County, Maryland, the problem of the owner-occupant has recently reached crisis. In a jurisdiction reaching over an area most of which is rural or semirural, and in which a proportionate number of suburban and rural homes were beyond owner-occupant financial capacity to bring into compliance, and in which water and sewage problems beyond code coverage had to be tackled, a considered decision was made to apply a housing code over the entire area but exclude the owner-occupied homes. To create a manageable administrative classification, at least for a beginning, a determination was made to limit the application of the code to rental housing. The proposal was laid before the regional office of HUD. G. Y. Clark, Director of Building and Housing in Howard County, reports what happened:

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[10] Letter to author from Raymond A. Anderson, executive secretary of the Evansville, Ind., Redevelopment Commission, August 7, 1968.

> We have battled to the wire with HUD about our housing code applying only to rental housing and we have lost—consequently we are going it alone after December 31, 1968, when we lose our certification from the regional HUD office.[11]

HUD will have to change its position if effective extension of housing code provisions into rural areas is to be politically acceptable. The problem needs thorough reexamination.

An approach to the owner-occupant problem, with emphasis upon the elderly and economically handicapped, has been developed in metropolitan Dade County, Florida, and so well reported by Assistant Director of Neighborhood Rehabilitation, Mr. Joseph R. Noffo, that his statement is reproduced as indicating both the nature of the problem and a method of attack:

> This department has been faced with an ever-increasing number of unresolvable code cases consisting generally of older, owner-occupied properties whose occupants were financially unable to make essential repairs. Such cases eligible for relief through welfare channels, exhibit the following characteristics:
>
> 1. Structures are generally old wood-frame, or frame-stucco buildings, unmortgageable and usually unencumbered, outside code enforcement projects.
> 2. Owner occupants are legal residents of the State, over 65, unemployed or semi-employed, but earn insufficient income to support normal living requirements. They cannot qualify as borrowers under any commercial loan program.
> 3. Owners are U.S. citizens (or have 20 years residence) and do not own real or personal property other than their homestead valued in excess of $600 if no dependents, or $1,200 for an individual with dependents or a couple.
> 4. Owners are often long established in the home and neighborhood, and are reluctant to relocate or accept public housing no matter what the improvement in living conditions might be.
>
> Individuals with properties in this category faced with the prospect of extensive code repairs, find themselves unqualified for home improvement loans, refinancing, or unable to secure funds through normal lending sources. Generally the home has undergone gradual deterioration and the occupants have become acclimated to its condition. Often the advanced age of the owner makes it difficult to secure competitive bids, find reliable contractors, and generally supervise the required repair work in an economical manner. Outside guidance is often needed, and the owner must be made to realize that his home has gradually become substandard and represents a threat to the occupants and the neighborhood.
>
> The policy of this Department is to avoid prosecution of code cases of essentially a hardship character. Owner-occupied properties in noncompliance showing no work done on successive programs checks are carefully scrutinized for possible hardship problems. Upon confirmation of hardship status, such cases are isolated for welfare referral. In the past, a significant backlog of hardship cases accumulated with no workable solution in sight.

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[11] Letter to author, July 17, 1968.

Several years ago, this Department contacted the Florida Department of Public Welfare in an effort to find a solution to this problem. At that time, it was determined that many property owners were eligible for welfare assistance, but had not made application; other individuals and families were receiving assistance based upon need but below the allowable maximums for their particular category. When the Welfare Department was made aware of conditions existing in these structures, and the importance of rehabilitating them to a minimum standard, they agreed to increase the shelter allowance where possible, to enable the owner-occupant to perform the the required repairs.

Generally, the difference between existing payments and the allowable maximum was on the order of \$20-\$30 a month or so. Thus it was difficult for the owner to find a contractor willing to perform the required repairs and accept his payments in small monthly increments. Furthermore, contractors were concerned about the advanced age of the customer, and the possibility of sustaining serious losses in the event the home owner died prior to completion of the payment schedule.

Thus, working together with State Welfare, this Department came up with the following techniques to facilitate home repairs under supplemental payments:

1. Inspectors in our Compliance Division were trained and qualified to perform investigative work in connection with hardship cases.
2. These Inspectors would review the case, interview owners and occupants, and complete a detailed Investigative Report, outlining the circumstances of income and expenses and the nature of hardship involved.
3. The Housing Code violations existing on the structure were reviewed and broken down into categories as follows:
   a) Hazardous violations requiring immediate correction (if any).
   b) Basic facilities required: Hot water, electrical, etc.
   c) Major maintenance items.
   d) Minor maintenance items.
4. The owner was advised to contact State Welfare, if no previous welfare assistance was being received, and complete an application form. The initiative, on welfare cases, must come from the applicant.
5. The completed Investigative Report, together with the categorized violation list was forwarded to State Welfare for their review and action.
6. If no previous welfare case existed, and the owner had made application as suggested, a case worker was assigned and sent out. Using our data as background information, arrangements were made for welfare assistance with a portion of the shelter allowance earmarked for housing code repairs.
7. If the owner was already receiving welfare assistance with less than the maximum allowable under the shelter allowance for his category, arrangements were made to increase such payments to the maximum. The welfare case worker already assigned to the case would take the categorized violation list and work directly with appropriate contractors in an effort to arrange the required repair work as rapidly as the available supplemental payment would permit. Often it was necessary to further subdivide the categorized list and correct a few items at a time until the entire job was completed.
8. The Compliance Section of this Agency would monitor the operation through a report form sent by Welfare and future checking by tickler date. Upon completion of

> repairs we would close out the case, and the supplemental payments from Welfare would cease.
>
> The key to the success of this system lies largely in the interest and ability of the individual Welfare Case Worker. This person must be capable of securing reliable competitive bids, and able to influence contractors into undertaking small repairs on older homes under payment terms which are inherently unattractive.
>
> Currently a further complication exists due to the building boom. Most contractors are already extremely busy and prefer new construction to rehabilitation work at any price. It is difficult to estimate on older buildings as often numerous unexpected problems appear when rehabilitation work has commenced. Contractors tend to bid high to cover any unexpected contingencies, thus aggravating the problem.
>
> Were sufficient staff available, this Department would undertake the liaison work with contractors currently performed by the Welfare Worker, but personnel limitations make such effort currently impossible. However, Federally funded code programs make provision for staff assistance in this area. Of course, such programs also provide Federal loans and grants for rehabilitation, obviating any requirements for welfare assistance. However, what we are concerned with here are cases in areas where such assistance is not available.
>
> In many cases, the welfare recipient is already receiving the maximum allowable shelter allowance, and no benefits for code repairs are available. Such cases are carefully reviewed to find alternate solutions, such as refinancing possibilities, or local relatives who might assist physically or financially in rehabilitation efforts.
>
> A recent amendment to the Social Security Act (Section 1119) authorized an amount to be included in welfare payments for repairs to a home owned by a welfare recipient. The Federal contribution is limited to $250 and must be matched 50-50 with State contribution. Adoption by the State Legislature is required, but so far the Florida Legislature has not adopted this program. The small amount available through this source limits its usefulness in solving code repair problems, however.
>
> In one local area (Coconut Grove) interested citizens have set up a revolving low interest loan fund specifically intended for low income home owners faced with maintenance and code repairs beyond their means. This has resulted in the resolution of several hardship cases which otherwise could not have been closed. Unfortunately, many indigent home owners in the area have failed to take an active interest in this fund to date.
>
> Basically, this summarizes the efforts and achievements of this Department in utilizing welfare assistance to resolve problem cases involving hardship. It is anticipated that much more can be accomplished as our staff grows and as liaison between this agency and State Welfare is further improved. Hardship cases considered unenforceable, originally accounted for about 15 percent of the total Departmental case load. By utilizing welfare assistance, it is estimated that this figure will ultimately drop to about one half or 8 percent.[12]

Emphasis should be given to the fact that Mr. Noffo's jurisdiction extends over both urban and nonurban territory. Like Director Clark's authority, an entire county is encompassed. But, whereas the Maryland county is undertaking a uniform code over the entire area, Dade County has different codes for the city and county areas. The "typical case" presented by Mr. Noffo is more likely to be found in appreciable numbers in rural than in urban substandard areas. It follows:

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[12] Letter to author, July 18, 1968.

> One specific case in which welfare assistance is aiding an elderly widow in rehabilitating her home is outlined below:
>
> Mrs. R., a Negro woman, age 74, was cited with various Housing Code violations involving lack of hot water and general deterioration. Mrs. R failed to make the necessary corrections and was subsequently contacted to determine the reason for noncompliance. She indicated that she was financially unable to comply, as her total monthly income amounted to $75.00 (Social Security, $41.00; Old Age Assistance, $34.00). Her case was classified as "Possible Hardship" and an interview arranged.
>
> Mrs. R was advised that her home was basically unsound due to an accumulation of defects over many years. It was suggested that she might find much more suitable accommodation in the modern facilities of Public Housing. Mrs. R indicated, as is common in these cases, that she had built this home in the early forties, and this was the only home she ever owned. She would prefer living there even if the roof caved in. She felt that she would lose her individuality, and her spirit, if forced to accept the circumstances of Public Housing. Furthermore, she counted her best friends among her neighbors, had established credit and shopping relationships in the local area, and as a property owner, had a certain amount of self pride which would be lost should she transfer to a mass-housing project.
>
> The interviewer completed an "Investigative Report" on Mrs. R which confirmed her need for assistance. The case was then classified as "Hardship" and this office contacted State Welfare by mail, giving details of the problem. State Welfare was sent the following data:
>
> 1. A copy of a detailed Investigative Report
> 2. A complete list of Housing Code Violations on this property.
> 3. A categorized list of the same violations broken down into basic facilities and general maintenance items in order of decreasing severity.
>
> State Welfare accepted the data as substantiating a need for housing repair, and determined that a supplemental increase of $35.00 per month could be granted Mrs. R. The case was assigned to Adrian Miller, a Welfare Case Worker, covering Mrs. R's area. Miss Miller, working from our categorized violation list, determined to correct the major violations involving lack of facilities first. She procured several estimates for the work of providing hot water to all plumbing fixtures, and chose a contractor to allow Mrs. R to pay for the work on the basis of $35.00 a month, out of her additional supplemental allowance. ...[13]

The consideration of the owner-occupant poor and their relationship to housing code enforcement will increase as greater attention is given to nonurban areas. The original APHA model code was designed with attention primarily on the large and middle-size cities. The problem of the housing code control problem in the suburban and rural areas cannot be met by simply insisting upon application of that code or the new PHS APHA-type code. There are trailers, mobile homes, houseboats, and vacation shacks to be considered. Industry is moving out of the cities, and it is possible that the 1968 Housing Act can provide help to extend controls as well as housing into undeveloped areas. These aspects of housing codes are inadequately developed.

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[13] A "typical case" sent to author by Mr. Joseph R. Noffo.

The owner-occupant provides a ''bridge'' over which communication and cooperation between housing administration and welfare may come to terms in the advancement of common interests. In rural areas it often happens that no building or specialized structural codes exist; this changes the nature of the problem of housing regulation and opens a door to another pattern of cooperative action. Finally the newer concepts in rehabilitation of people may, along with special education, have significant roles in helping owner-occupants help themselves in ways not so available to tenants. In other words, the movement of housing code administration into rural and suburban areas is not simply a hard-nosed insistence that all of the bits and pieces be kept intact.

Chapter 7

LANDLORD AND TENANT: THE LEGAL-ADMINISTRATIVE BALANCE

The nature of housing codes as a succession of imposition of duties and, increasingly, patterns of mutual and reciprocal obligations upon landlords and tenants has been discussed. When this is made pivotal to the understanding of housing code administration, issues become more clearly definable, and considerable underbrush can be cleared away. Relationships between landlord and tenant that were previously based upon long-enduring legal norms relating to an assumption of a free market in which relationships are established between parties under contract, lease, and covenant, become subject to reexamination; what are the obligations and duties under housing codes doing to this body of inherited law? The focus of housing code administration in larger urban centers is the relationship between the poor or impoverished tenant and the landlords, some of whom are operating subsidized public housing and others, private, business-oriented and profit-seeking units. The landlord increasingly is pressed by competition with subsidized housing; he increasingly feels the impact of code restrictions that increase his costs. Tenants dependent upon a different and uncoordinated subsidy system find their capacity for payment of rents fixed by governmental doles. Together the welfare, public housing, and housing code systems constitute pressures that minimize the area of free bargaining and substitute governmental standards in defining the relationships between landlords and tenants. The present confusion of governmental subsidy systems and the attempt to use police power independently of economic facts contribute to confrontation hostilities. To resolve this growing hostility and achieve a public peace and stability must be considered a major problem confronting housing code administration.

The thrust, or immediate purposes of housing codes, is not to redesign the law of landlord-tenant relations. Housing codes spring from a deeply emotional striving toward providing better housing for the poor. They are part of a broader social revolution dedicated to bringing the underemployed and unemployable into closer proximity with the middle class. The language used in this movement is surcharged with the emotional content that flows from the assertion that it is directed at ''social justice.'' The ancient landmarks, even those that supported the keystones of our traditions, must, and will, yield. A consideration of the general purposes at which codes are directed can be stated in terms of the emerging ''rights'' of the poor. They are to have (1) housing with adequate space at prices they can afford with their subsidy monies or substandard earnings; (2) premises that are maintained, including common living areas, in habitable condition; (3) basic services, usually including hot and cold water, light, heat, and private bathrooms; (4) assurance of undisturbed occupancy as long as they act responsibly; and (5) reasonable privacy, including protection against neighbors, landlords and their agents, and governmental inspectors.

Housing codes, in their fundamental impact in our economy, may be more important

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in destroying the institutional belief pattern and practice that a man's home is a matter of contract in the free marketplace than in instituting appreciable improvement in public health. The law of landlord and tenant, growing out of the previous system of peasantry and villeinage under manorial landlords, was one of the key institutions in creating the condition of ''freeman.'' This law assumes both parties to the arrangement are sufficiently ''equal'' to ensure effective bargaining. In this sense the landlord-tenant relationship is a repudiation of the middle ages and a recognition that a freeman is unattached to land or lord.

Technological change, working in conjunction with a deeper concern for the poor and underemployed, has seen a decline in the bargaining equality or a decline in the acceptability of the theory that this condition exists. Like the concern for the plight of the ''worker,'' supporting the collectivization principle in the previous generations, the plight of the underemployed or unemployable has been focused on getting better housing. A warning is timely that concern for physical betterment must not undermine the freedom that is inherent in contracting. In this perspective, housing code administration assumes an importance that reaches deeply into social values.

To preserve the critical element in freedom of contract requires establishment and maintenance of sufficient bargaining equality between tenants and landlords, whether poor or otherwise, through which choice of living quarters is a vital element. This can best be done by increasing the available resources of the poor tenant so that he can afford bargaining within a wider spectrum of housing. The greatest danger at present is that the subsidy paid to the prospective tenant presents a choice between public housing, independently subsidized some 25 to 35 percent, or private housing. The double subsidy sufficiently destroys competition over a period of time, and in a ''free'' market the tenant can choose between public housing or inferior private housing.

Public housing developed extensively in older cities before the urban renewal-type programs got underway. Public housing was not originally intended to provide double subsidy; it was to keep people from turning to welfare rather than give advantage to those on welfare. But history did not leave this equation alone, and for devious reasons, welfare-subsidized families gradually accumulated in public housing. This process continues, governmental policies increasingly giving welfare renters a priority over others.

To relieve the situation HUD has been given responsibility to provide other forms of subsidy to so-called private housing experiments as public housing has acquired the reputation as the province of the subsidized poor.

The housing code is a tool or device designed primarily to force private landlords, or owner-occupants, to provide facilities, space, and conveniences more nearly comparable with public housing. This is to be done independently of the financial capacity of the owner to make designated changes or of his ability to recover rental payments sufficient to make the investment profitable. The premise is that the code embodies health, sanitary, and safety standards that are necessary to the public interest. The tenant is entitled to these[1] and the landlord is required to furnish them. Otherwise the owner can abandon his property. In some instances he may be required to pay, if he can, to demolish it. The codes, for reasons that are not always clear, avoid the hard economic facts and elevate the needs of tenants. Obviously, housing codes are part of a revolution that is not well thought out but that is moving with emotional thrusts reflecting political dynamics.

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[1] The question of the ''tenants' rights'' are very much in the forefront of political action. A recent requirement in New York City relates to landlords under rent control. It requires landlords to have printed on the back of every lease information that would advise tenants of what their rights are under the rent control law, to be printed in both English and Spanish. Forms for tenant application to reduce rents are also printed in both languages. The subject of remedies and governmental programs for the very poor tenant is beyond the scope of this report. However, two law review articles delineate the problem in its detail. See: Carl Schier, ''Protecting the Interests of the Indigent Tenant: Two Approaches,'' *California Law Review*, vol. 54, (1966), p. 670-693; and Robert Schoshinski, ''Remedies of the Indigent Tenant: Proposal for Change,'' *Georgetown Law Journal*, vol. 54, (1965,6), pp. 519-558.

The caveat emptor doctrine has been whittled away at by judicial decisions and accompanying opinions for almost 40 years. In 1931, a Minnesota Supreme Court stated this perspective:

> The written lease was silent as to any provision as to who should be charged with the responsibility of waging any necessary war on vermin. The rule at common law was that the law did not impliedly impose any such duty upon the landlord. This rule still prevails as to the leasing of an unfurnished dwelling house. But such rule, like many of the rules of law, is not inflexible, but some degree elastic, and must be construed to meet conditions unknown at common law. There is much in and about such an apartment building far beyond the control of a tenant in one of the apartments.[2]

In 1953 a visitor to a tenant was injured by a masonry wall falling and striking him. The lease was silent about responsibility of the landlord to make repairs or maintain the demised premises. No statute interposed to modify application of common law doctrines. The court concluded that where the owner parts with entire possession of premises,

> the tenant, either by express provision of the lease or by the silence of the lease on that subject, assumes liability for the keeping of the premises in proper repair, the tenant, and not the owner, will be liable in case of an accident due to negligence in allowing the premises, or any portion thereof, to get out of repair.[3]

The significance of the *Bowles* case lies in the strength of the dissenting opinion. Judge Bazelow considered the rule adhered to by the majority an anachronism, living on ''through stare decisis alone rather than through pragmatic adjustment to the felt necessities of (our) time. I would therefore discard it and cast the presumptive burden of liability upon the landlord. ...''[4]

The interweaving of legislative and judicial policy modification is illuminated in *Pines* v. *Perssion*. The Wisconsin Supreme Court stated:

> The general rule is that there are no implied warranties to the effect that at the time a lease term commences the premises are in a tenantable condition or adapted to the purposes for which leased. A tenant is a purchaser of an estate in land, and is subject to the doctrine of caveat emptor. [Chief Justice Martin continued], Obviously, however, the frame of reference in which the old common law rule operated has changed.
>
> Legislation and administrative rules, such as the safe-place statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgement - that it is socially (and politically) desirable to impose these duties on a property owner-which has rendered the old common law obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious cliché, caveat emptor. Permitting landlords to rent ''tumbledown'' houses is at least a contributing cause of such problems as urban blight, juvenile

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[2] *Delameter* v. *Foreman*, 1931, 184 Minn. 428, 239 N.W. 148,149.

[3] *Bowles* v. *Mahoney*, 1953, 202 F. 2d 320,323,4. The quoted statement was taken from Security Savings and Commercial Bank v. Sullivan, 1919, 49 App. D.C. 119,120; 261 F. 461,462.

[4] *Bowles* v. *Mahoney*, 1953, 202 F. 2d 320,325.

delinquency and high taxes for conscientious landowners.[5]

In 1960, the Washington, D.C., Circuit Court, the situs of the *Bowles* v. *Mahoney* decision, found new reasons for increasing landlord responsibility, not by following Bazelow's argument, but by expanding and particularizing the logic of Justice Martin. In *Whetzel* v. *Jess Fisher Management Co.*, the court said:

> Turning to the instant case, we must determine the authority of the District of Columbia Housing Regulations and their effect upon the landlord's duty of care toward his tenants.[6]

The court found no difficulty in considering the lease subordinate to the provisions of the code. (The court considers ''code'' and ''regulations'' in the case as substantially the same):

> Upon whom are the duties specified by the regulations imposed? Some are upon the landlord alone. Under sec. 2304, ''No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents and vermin.'' At the very least, this imposes an obligation upon the landlord to put the premises in safe condition prior to their rental.[7]

A very significant element in *Whetzel* is that the court considers the code ''regulations'' a modification of the criteria relative to tort or negligence and not of implied warranty. On this premise, the case is considered appropriately subject to jury trial and was remanded for trial.

When the court expanded the relationship in the application of the negligence doctrine under the Housing Code, he said:

> The regulations also impose other obligations which are extended to both the landlord and tenant in order to achieve their broad purposes. Section 2301 provides that ''No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations.''
>
> Thus it appears that section 2301 imposes upon the appellee a duty of care toward its tenants. This duty can be satisfied either by making the necessary repairs or by terminating use of the premises as a place of human habitation. Breach of that duty is, according to the principles which we have discussed, at least evidence of negligence.
>
> But section 2301 also creates a duty of care which the appellant owes to herself. Breach of this duty is likewise at least evidence of contributory negligence. The question then is, does her contributory negligence so clearly appear from the face of the complaint that she is not entitled to go to trial? We think not.
>
> In the first place, even if she were contributorily negligent per se, there would remain for the jury the question of proximate cause. Richardson v. Gregory, No. 15576, 108 U.S. App. D.C. 267, 281 F.2d 626. Second, the pleadings and affadavits which constitute the present record do not provide an adequate basis for determining whether the plaintiff-appellant was contributorily negligent as a matter of law by occupying nonconforming premises.[8]

In *Whetzel*, the code regulations were given priority over caveat emptor; in *Pines*, over the traditional law of tort, and in *Edwards* v. *Habib*—decided May 17, 1968, by the U.S. District Court of Appeals for the District of Columbia--equitable jurisdiction was extended to recognize the redefinition of landlord responsibilities under code provisions.

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[5] *Pines* v. *Perssion*, 1961, 111 N.W. 2d 409, 412, 413.

[6] *Whetzel* v. *Jess Fisher Management Co.*, 1960, 282 F. 2d 943, 948.

[7] Ibid., 949.

[8] Ibid., 950.

Judge Wright, for the majority stated:

> The housing and sanitary codes, especially in the light of Congress' explicit direction for their enactment, indicate a strong and pervasive Congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary places to live.[9]

In this case, as in *Whetzel*, the Appellate Court remanded the case to the trial court. (This case will be further treated in the analysis relating to the substantive issue under eviction.)

In February 1968, *Lillie Brown* v. *Southhall Realty Co.* was decided by the District Court of Washington. While this decision is less significant as a landmark than *Whetzel*, *Pines*, or *Edwards*, it is an extension of the law considering contract relations subordinate to code provisions. A contract to lease for habitation purposes, even when the tenant knew of the violations of code provisions, ''imply a prohibition so as to render the prohibited act void.''[10]

The following quotation explains the basic logic of this doctrine:

> This evidence having been established and uncontroverted, appellant contends that the lease should have been declared unenforceable because it was entered into in contravention to the District of Columbia Housing Regulations, and knowingly so.
>
> Section 2304 of the District of Columbia Housing Regulations reads as follows:
>
> > ''No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin.''
>
> Section 2501 of these same regulations, states:
>
> > ''Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants.''
>
> This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.
>
> It appears that the violations known by appellee to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the ''habitation'' unsafe and unsanitary. Neither had the premises been maintained or repaired to the degree contemplated by the regulations, i.e., ''designed to make a premises...healthy and safe.'' The lease contract was, therefore, entered into in violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained.[11]*

What may have been sufficient equality between landlord and tenant, to presume a free bargaining relationship, no longer controls. Tenant and landlord are required to meet ever-extending code requirements. The ''state'' increasingly controls both the capacity of the tenant to bargain and the capacity of the landlord to condition the terms of the agreement about conditions that ensure the rising expectations of social justice in the Great Society.

The Eviction of the Poor

It is in the long-established authority, under law, of the right of the landlord to evict the tenant, especially the tenant dependent upon welfare subsidy, that a bitter conflict has developed. The conflict is not limited to private housing but extends to public housing as well. A HUD regulation, issued as of February 7, 1967, required local housing authorities to tell tenants the reasons for eviction and give an opportunity to make such reply or explanation as may be wished.[12] The probable next step will be a requirement for a hearing; this will develop under the guidance of the judiciary. It must be presumed that public housing administrators will be put to additional expense, which may be shared with welfare administrators when welfare clients are involved. Rents in public housing will normally increase slightly; it is uncertain whether the increased welfare costs will be for ''local,'' ''state,'' or ''Federal'' exchequers to meet.

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[9] *The New York Times*, May 18, 1968, p. 23.

[10] Memorandum released from National Commission on Urban Problems, Feb. 21, 1968, *Lillie Brown* v. *Southall Realty Co.*, decided Feb. 7, 1968, p. 5.

[11] Ibid., 3. *In evaluating the impact of the sequence of cases from the District of Columbia, it must be kept in mind that Congress occupies or parallels the state legislature in relation to housing codes in the District.

When tenants can escape rent payments or harass landlords by paying them into escrow if housing code violations officially exist, there is at least a possibility that a tenant will both create and report a violation. The landlord, in return, is likely to give the tenant notice to get out. The tenant says this is retaliation for reporting the violation. The U.S. Court of Appeals for the District of Columbia agrees with the tenant: ''While the landlord may evict for any legal reason, or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities.''[13] Judge Wright felt strongly about the plight of the tenant: ''In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory evictions cannot be tolerated.'' Dissenting Judge Danaher, thought that he deplored landlords' securing possession of their property for ''base reasons,'' but if the change is to be made, ''Congress should provide the basis.''[14]

A present bill before the House of Representatives[15] would require landlords to show compliance with codes and regulations before eviction can take place. A 9-month period must elapse before eviction can take effect. This supersedes any contract or lease provision. If the landlord is financially unable to meet the terms of the code compliance expenditure there is little likelihood he will collect rent during the 9 months. He might just as well assume that the tenant has permanent rent-free quarters until the city gets around to taking over. A presumption is indulged that the city will be held to the same standards as the defaulting landlord. ''Retaliatory'' rent increases are also proscribed under pending legislation in Congress. Even if the landlord complies with the code, it is presumed that an attempt to recoup will be viewed, by the tenant, as retaliatory. One can look forward to a substantial increase in publicly owned housing in cities that move so swiftly toward social justice.

Some states have attempted to come to grips with the eviction problem. In Pennsylvania, if a tenant can get his abode certified as ''unfit for human habitation'' he can continue to live there, but payment of rent is suspended. This type of legislation puts new and additional burdens on housing administrators or on whoever is considered responsible. A ''minimum'' standard housing code is supposed to relate to standards of fitness for human habitation. But in Pennsylvania, dwellings are subject to a three-step classification: (1) needs minor repairs but is fit for human habitation; (2) needs major repairs and is unfit for human habitations, at least not worth paying rent to live in; and (3) really unfit for human habitations; an imminent hazard requiring tenants to move out immediately.[16] Interestingly the second category, in need of major repairs and unfit for human habitation, provides that the landlord has a year to fix things up but that the tenant need no longer find himself subject to eviction from the unfit dwelling. Pennsylvania courts may find some trouble determining the status of an ''ordinary'' minimun standards housing code in this jamboree.

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[12] This HUD directive was the basis for the Supreme Court to decide to rule whether a tenant was constitutionally entitled to reasons for her eviction. From Public Housing. *(Joyce C. Thorpe v. Housing Auth. of City of Durham,* No. 712, Supreme Court U.S., Apr.)

[13] *The New York Times,* May 18, 1968: *Edwards v. Habib.*

[14] Ibid.

[15] H.R. Bill 257, Title VI, in committee at time of reporting. (J. Rosenthal and L.W. Secrest, III. ''Retaliatory Evictions and The Reporting of Housing Code Violations in the District of Columbia,'' *G. Washington Law Review,* vol. 36, (Oct. 1967). p. 197.

A recent article describing Pittsburgh's experience with the program noted that the protection against eviction and rent increases for the 6-month escrow period (the law was amended to provide for a shorter escrow period than the original 1-year allotment) has been a focus of ''considerable dispute and legal assistance is sometimes required.''[17]

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[16] Pa. statute ann. Title 35, sec. 1700-1 (Supp. 1966), as reported in ''Comment,'' *Duquesne Law Review*, vol. 5 (1966-7), pp. 413 ff.

[17] Norman Krumholz, ''Rent Withholding as an Aid to Housing Code Enforcement,'' *Journal of Housing*, vol. 25 (May-June, 1968) p. 243.

Chapter 8

THE PROVINCE OF PERSUASION

Obtaining compliance in housing code administration, as in other regulative systems involving broad discretion, is a skillful balance of education and persuasion on one hand and compulsion on the other. Of greatest difficulty is the functional definition of the ''watershed'' between the two. When should appeal to enlightened self-interest or patriotism yield to threats of penalty? The need for consistency in decision making to avoid the appearance and reality of arbitrariness is very great. The need for individualization of cases in situations in which policies are not clearly defined is also an important ingredient. Time is short, and pressures from central government and local reformers are insistent. How can administration, seeking to maintain the virtues of fairness in procedure and efficient action, best accommodate this dilemma?

A basic principle, easily forgotten, is that punishment should not be imposed until willful violation has been demonstrated. Most code systems rely heavily upon criminal sanctions, and the tradition in criminal law is that a man is innocent until proved guilty. Guilt involves both intent and act. Even in Chicago, the largest jurisdiction relying heavily upon equitable enforcement, the doctrine shows little modification. Courts lean over backward to see that every opportunity has been made to meet standards when these standards are uncertain, especially when requirements and prohibitions are new and run counter to long-established values. Chicago administrators have found that court hearings are an exhausting succession of postponements. Effectiveness is possible only because an assistant commissioner takes a daily account of each of the long line of cases pending. Where criminal penalties are practically the exclusive sanctional system, conditions are generally unsatisfactory from code administrators' viewpoints. There is a marked tendency to blame the courts.

If the guiding principle in administration is to ascertain that willfullness, gross negligence, or conscious illegality is evidenced beyond challenge in the record and that requirements and prohibitions are known before alleged illegality is asserted, the relationship between administrators and courts will improve.

Codes, in general, fail to separate violations qualitatively. Provisions are lumped together as though they were all equally hazardous to public health, safety, and morals. A long list of prohibitions or requirements cannot all be equal in danger to the community. This is given special perspective when provisions are added that permit subjective classifications by administrators when ''emergency'' conditions exist. When an emergency exists our tradition recognizes the need for short circuiting regular procedures; this is known as summary power. But the housing code, generally, is more of a list of conveniences and amenities than one of health and safety hazards. Inadequate separation of ''ordinary'' from ''summary'' jurisdiction produces confusion among those affected and, in the community generally, results in judicial hesitation.

It is not an increment in public interest to expand penalty provisions beyond general understanding and support. If there is reason, whether based in the belief pattern of large numbers of citizens or based in technological knowledge about health and

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its relationship to environmental factors, for codes, it is still not warranted that enforcement outstrip the conditions that would sustain jury verdicts. Administration must create the foundations before it seeks to punish laggards who are beyond the education and persuasion that convince the great majority.

Specificity in Definitions

Housing codes are composed, in many of their substantive provisions, of inexplicit or ambiguous terms. Such terms are necessary when legislation reaches into untried subject areas. Regulation of housing, at least above the level of the ancestral nuisance, is unprecedented. It is not enough that citizenry adversely affected be given general notice that such terms have been enacted into "law." The terms must be particularized and given meaning in applicable situations. Administrators must recognize that this process is not simple and cannot be done without patience and adequate time for statement, reiteration, and discussion. The problem is complicated because the poor tenants, and not an inconsiderable number of owners and landlords, are illiterate. This illiteracy is more than lack of basic education; it is cultural and evidences a lack of urban sophistication. The problem of communication is made tremendously complicated when it is realized that information is expanded by personal relationships. In the inner courts of ghetto areas the circulation of newspapers is small. Few television programs can be expected to go into the minutiae necessary to achieve understanding of urban expectations and the intricacies of housing codes.

Language acquires particularized meanings when used and reused to convey specific connotations. Code administration competes for attention with commercial advertising and at unlimited disadvantage. It is possible, however, through deliberate effort to achieve a "working" basis for enforcement of housing codes. This institutionalization of definitions might be termed the primary phase of code administration. Only when this phase has been given recognition and effectively undertaken can enforcement be expected to be successful and courts act to support administrative determinations. It is wise to remember that our legal tradition has for centuries contended for the doctrine that a man's home is his castle; housing code inspection challenges this established norm.

Governmental Impatience

As late as 1964 the Urban Renewal Administration underestimated the difficulty of balancing education and compulsion as sequential as well as parallel problems. The housing code problem is a segment of the "workable program" and probably the most complex of its segments. The workable program presents a different type of educational problem than the housing code does. It is a thrust toward a much more integrated approach to urban problems. In elevating the integrated approach it must, of necessity, give less attention to the components of which it is constructed. Urban Renewal, including the workable program, has been introduced into urban government with relatively slight regard to widespread understanding. It has been tied to badly needed funds to reestablish tolerable conditions in cities in the face of unprecedented in-migrations. But before the conceptual conditions have become fully assimilated, the demand for housing code enforcement has been decreed.[1]

Administrative Experience

Administrators are not always able to determine where their trouble lies when confronted with unsatisfactory compliance. They generally consider that there is something wrong with the relationship to courts, but few can particularize the difficulty. Experienced administrators increasingly recognize that the balance between persuasion and compliance is a basic factor; their experience and the directives from Washington seem unduly at variance. A selection of experiences will illuminate the problem.

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[1] "During the first year after adoption of the housing code it is expected that the community—in addition to developing its planned, systematic, overall compliance program—will undertake an interim housing code compliance program." *Housing and Home Finance Agency, Guidelines* G-9, 9/1/64.

Undertaking code enforcement without adequate educational conditioning may stir up animosities that will cause a repudiation of both the code and the Urban Renewal money to which it is attached. In Racine, Wisconsin, in the late 1950's local interest in obtaining Urban Renewal funds resulted in a determination that local housing standards were inadequate. As a consequence ''a housing code was prepared and adopted as a requirement for Federal funds. After less than three years of operations it met with local disfavor to the extent that at a referendum vote the code was abolished.''[2]

In Sioux City, Iowa, T. E. Corothers, the responsible administrator of a relatively successful program wrote: ''Prior to the adoption of the Minimum Housing Code in 1961, I spent approximately two years talking to citizen's groups throughout the community about the conditions of housing and showing numerous photographs of existing conditions.'' He added the following observation: ''The 'hard-nose' approach or 'letter of the law' enforcement will result in public upheaval as we have seen happen in so many of our cities, notably Lincoln, Omaha, Des Moines, etc.''[3]

Chicago, in its Housing Code program, distributed 75,000 explanatory pieces of literature explaining the housing code and outlining tenant and landlord responsibilities during 1967. Commissioner Smith further reported:

> Hundreds of meetings were held with community organizations in our Department, as well as in community locations during 1967. Department personnel are now staffing the nine neighborhood service centers, the Chicago Committee on Urban Opportunity and Urban Progress Centers and the Urban Renewal Project Centers. The Department intends to extend and improve its contribution to the operation of the neighborhood service centers.[4]

The Chicago experience recognizes that the educational problem is more than a preenactment or preenforcement factor. After years of experience the emphasis is increasing. As long as the low-income population is mobile and the in-migration continues, the problem will continue.

In New Orleans a new Housing Code was adopted in January 1967. Clinics to help low-income tenants understand the code were undertaken a year later. It is important that code violations be equated with housekeeping responsibilities, and the clinics undertook to consider such topics. The character of the problems is given emphasis when it is noted that New Orleans, in the Housing Improvement Division, added a number of social workers.[5] Relocation of displaced families in code-complying units with accompanying education of such families is central to this undertaking.

The Irish Channel, one of New Orleans' incipient blighted areas, was the target for one of the first clinic ventures. In May 1968, the program was augmented by the special assignment of a housing inspector to the Irish Channel Action Foundation on a full-time basis. The inspector, Mr. Walter Randall, has become involved in numerous activities; in addition to survey and inspection work, he works in cooperation with community organizers, is on call at the neighborhood development center, and offers instruction and personal help to tenants in home maintenance skills. Code enforcement is used to bring about ''prompt but gentle compliance'' by landlords and residents.

Tenants are asked to make the repairs they are responsible for, before the landlord is asked to repair, this being an important part of the persuasion used to obtain landlord compliance. The tenant is asked to set his own deadline for repairs, after he has become aware of the number of repairs he is to make. The landlord also helps the inspector set a time period for the repairs and improvements he is responsible for. Both parties are reminded of their agreements periodically, and the positive approach, combined with setting realistic standards, has resulted in most cases in prompt compliance.

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[2] Letter from Albert C. Edwards, Commissioner of Health, March 8, 1966.

[3] Letter to author, June 4, 1968.

[4] Commissioner of Buildings, Sidney D. Smith, 1968 Budget Message.

[5] *Journal of Housing*, vol. 24, (October, 1967), p. 516.

The progress report notes: ''By stressing the point that they must work together if slum conditions are to be eliminated and by using short-term penalties and consistent encouragement to bring about immediate improvements, the Irish Channel experiment has been remarkably successful in obtaining the voluntary cooperation of both landlords and tenants.''[6]

Baltimore has had long experience in trying to use clinics as educational devices. This experience is, however, a combination of education and penalty that makes evaluation difficult. The clinic is operated for tenants who have violated the code and who are considered by a magistrate as interested and capable of learning. Such tenants are given a choice of attendance at the clinic for 1½ hours for 8 weeks while on probation or payment of a fine. Since the very poor cannot ordinarily pay fines, the option between fine and clinic may not be very real. Experience has indicated lack of sophistication of participants who tend to be Negro females and heads of families. Starting as an information-dispensing program it has moved toward a problem-solving focus. It is reported that recurrencies in violation have been sharply reduced. While some expressed satisfaction with the clinic, ''nearly all have stated that they would not have come to all sessions if they had not been under probation.''[7]

The Division of Housing is in the Bureau of Building Inspection in Baltimore. The division is responsible for Housing Code enforcement. It has developed what seems to be an exceptionally good ''handout'' in its program. This large, folded sheet clearly indicates responsibilities of owners, landlords, and tenants and explains the responsibility of the city. It uses a checklist under headings that make the approach as simple as possible.

> Guidelines for Good Neighborhoods [handout]
>
> The Housing division has embarked on an intensive program of public information publications. With the expansion of official staff and the increase and diversity of inspectional programs, the need for continuing, meaningful communication both within the Division and with the community at large has become pronounced and overriding. ... Not only is it important to develop this communication, but the method used must be appealing, graphic and pertinent enough to accomplish the desirable objective. Working toward this end, the Housing Division has been producing Newsletters which are distributed in different Code Enforcement Areas of the City. Such publications are put in the hands of as many area families as possible and on a continuing basis. ... Efforts are made to utilize photographs and drawings or cartoons with ''eye appeal.'' Each issue endeavors to tell a story.[8]

The problem is not entirely one of help for low-income renters. In the Haight-Ashbury section of San Francisco, architects and architecture students have given free advice to homeowners referred by housing inspectors. Some householders have come in for help on their own for help in planning, design, or alternatives in meeting code requirements.[9]

The Milwaukee Health Department has created a mobile display unit.[10] This is moved from area to area as part of an educational program. It permits the use of visual materials and provides a rallying point for neighborhood and school instructional purposes. The mobile display has been centered upon housing and environmental problems. Owner-occupants as well as tenants and some landlords have been effectively reached.

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[6] Progress report, dated July 31, 1968, of the New Orleans Division of Housing Improvement and ICAF Drive Against Blight In The Irish Channel Target Area, p. 16.

[7] Bateman and Stern, ''Housing Clinic for Code Violators'' *J. Housing*, April, 1966, p. 203, and a note in No. 6 *Journal of Housing*, 1962.

[8] Housing Division Annual Report 1966, pp. 8, 9.

[9] *Journal of Housing*, vol. 24 (Nov. 1967), p. 571.

[10] Interview with Dr. E. R. Krumbiegel, Milwaukee, Wisconsin, July 18, 1968.

As more attention is given to rodent control, the educational foundations of enforcement will rise to the surface. Rodent control is not simply finding holes in foundations, or broken windows and fixing them. Rats must eat, and the food supply must be curtailed if they are to be controlled. The distribution of responsibility between landlords and tenants is easy ground for trouble. The landlord may be responsible for covered garbage cans, but the tenant must put the garbage into the cans and replace the cover. If garbage is distributed it will attract rats. One tenant in a building can provide food to sustain a breeding program of rats. The nature of low-income populations makes it very difficult to obtain a category of tenants, all of whom will exercise the circumspection in handling wastes necessary for effective control. Codes try to distribute responsibilities for internal home units, common areas, and responsibilities for receptacles. Before this problem can be dealt with efficiently, not only will extensive and continuing education in sanitation be necessary, but also in all probability, in large concentrations of low-rent payers, some sanctional measures will prove necessary against unresponsive families. At least the heaping of responsibilities upon landlords does not get to the bottom of the matter.

Evansville, Indiana, a city of some 142,000 people, has evidenced housing code compliance with what appears to be optimum emphasis on education, persuasion, and cooperative relations with landlords, tenants, and owner-occupants. Administration is in a Redevelopment Commission. It has a staff of five headed by an executive secretary, Raymond A. Anderson. Its code is the 1952 APHA, with the HUD requirement of one bathroom per dwelling added.

Mr. Anderson describes their experience:

> We discovered that the mechanical process outlined in the code for notifying owners of code violations—ordering them to do something and then threatening them with legal action if they failed to comply promptly—could yield us more enemies than friends, more cases than our Board of Public Safety was willing to handle, and would tie up our inspectors for considerable periods of time in nonprofitable activity.[11]

A number of elements in the Evansville operation are noted. This does not mean to convey an impression of their uniqueness but to indicate a patterned approach that is somewhat unusually complete.

In the Evansville story, the period during the original certification by Urban Renewal up to the time of recertification offers little beyond ordinary activity. It was with the stimulation of recertification that full awareness of the role of educational cooperation blossomed. This resulted in revitalization of leadership in late 1960 and the relocation of code administration. In the transition year of 1961, some 232 compliances were obtained; in 1964, the total was 1,565 with the same size staff.

A side effect of the code enforcement, information not usually available, was a reduction in reported fires in inspected areas by 11 percent, while the number of fires in the entire city increased by 5 percent.

The approach is indicated in the form of notices sent out following inspection. The first notice begins: ''It would be appreciated if you would please correct these deficiencies at your earliest convenience.'' At least 50 percent are corrected within 60 days, and work is underway on some 30 percent more. Before a second notice is sent, an attempt is made to establish personal contact, by visit or telephone. If indicated, a second notice is sent reading: ''You are hereby requested to correct these deficiencies within 60 days of the date of this letter.'' Reinspection after this 60-day period still permits consideration of extenuating circumstances which include illness, age, financial incapacity, etc. Although no clear provision is made for a conference-type hearing, the small size of the staff permits informal discussions: the supervisor makes the decision to proceed sending out formal notification ordering compliance under threat of facing legal proceedings.

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[11] Raymond A. Anderson, ''Codes Agency Reports on Four Years of Hard Work, Perseverance,'' *Journal of Housing*, vol. 22, No. 3 (1965).

> Once an owner has started to comply or has promised to do so, he may receive several visits, telephone calls or personal letters from the inspector before he receives the second notification. We have made as many as two dozen contacts in person, by letter or by telephone before obtaining compliance. We feel that this method is definitely better than wholesale hearings before our Board of Public Safety. One owner accused us of ''politely pestering'' him to make repairs to his rental property and he wasn't too far from wrong.[12]

If a careful record of such a long-winded process, including the claims, promises, and contentions of the owner, is made, the chances of court affirmation will be high. This conclusion is supported by the record.

Other devices are used. Names and addresses of slum property have been published in local papers after the second notice. The welfare subsidy administrators are notified to increase pressure on landlords or to relocate clients. A rather remarkable procedure is reported: failure of a welfare client to improve bad housekeeping practices can result in their being stricken from relief rolls.

A very important element in Evansville is a ''revolving fund'' to meet hardship cases. This fund can help people spread the time period to cover costs. But where people are elderly or on low fixed incomes, the long-term, low-interest loan will not suffice. The city council makes, or has made, appropriations to keep the program going. The use of repairs against liens, possible under the code, is seldom used. They involve undue complications with prior welfare liens.

Another key to the Evansville approach is to proceed against relatively small, cohesive neighborhood areas and use a high concentration of publicity about both conditions and explanation of boundaries. Letters and brochures are delivered to each house 2 or 3 days before inspection.

> When the matter of entry by Housing Inspectors was given publicity by both the newspapers and the television networks during the spring of 1967, as a result of consideration of this matter by the U.S. Supreme Court, we had a flurry of resistance to entry by our housing inspectors. We probably had during a two-month period approximately 36 homeowners that refused entry to our Housing Inspectors on their initial contact. After receiving a letter from our City Attorney, entry was granted to all but a handful of these homes, and since this handful was comprised of owner-occupants that, based on exterior inspection were in sound condition, efforts to obtain entry were not pursued. However, since that time, things have gotten back to normal and we are not experiencing any resistance to entry by our Housing Inspectors.[13]

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[12] Ibid., p. 148.

[13] Letter to author from Raymond A. Anderson, dated April 1, 1968.

Chapter 9

ENTRY AND PRIVACY

Housing code administration represents an expansion of regulatory authority. This expansion is an intrusion into the privacy of the home. The Constitution, in the Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched or things to be seized.

There has been a long series of judicial decisions that uphold the legality of entry and search without a warrant by officials concerned with protecting the public health. Cases in which this is permitted can be classified as emergency situations. A meat storage plant can be entered and searched to find unwholesome food;[1] inspections can be made and if tubercular cattle are found they may be summarily destroyed;[2] houses can be entered and quarantined to prevent spread of disease.[3] In 1957, the Supreme Court "upheld, by a five-to-four vote, a state court conviction of a home-owner who refused to permit a municipal health inspector to enter and inspect her premises without a search warrant."[4]

On June 5, 1967, the Supreme Court re-examined the problem of entry to inspect for code violation under a statute that made refusal to permit entry a criminal offense. It reversed the doctrine and rule of law announced 10 years earlier; this time by a vote of six-to-three. Since the problem of entry to inspect is basic to housing code enforcement and because the opinion of Mr. Justice White, speaking for the majority, includes commentary of particular importance to the development of future policy, this opinion, *Camara* v. *Municipal Court of San Francisco*, will be examined as to its significance.[5]

Mr. Justice White considered that housing inspection generally was not classifiable as "an emergency situation." "In the case of most routine inspections, there is no compelling urgency to inspect at a particular time or on a particular day. Moreover, most citizens allow inspections of their property without a warrant...it seems likely that warrants should normally be sought only after entry is refused...or there is other satisfactory reason for securing immediate entry."[6]

This statement leaves somebody, presumably the administrator, discretion to determine if there is "other satisfactory reason" than a citizen complaint to use force to gain admittance when entry is refused. Presumably the resistant citizen could seek damages against the forceful inspector, and if the court decided the reason for entry was unsatisfactory, the inspector would be subject to damages.

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[1] *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306.

[2] *Kroplin* v. *Truax*, 119 Ohio St. 610, 165 N.E. 498.

[3] *Compagnie Francaise* v. *Board of Health*, 186 U.S. 380.

[4] *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U.S. 523,525: (referring to *Frank* v. *Maryland*, 359 U.S. 360.)

[5] Ibid. Future references to this case will be cited as *Camara*.

[6] Ibid., 539, 540.

Justice White did not consider that his opinion would upset established workways. He stated: ''Similarly, the requirement of a warrant procedure does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not entry by force, to inspect.''[7]

The *Camara* decision might have elicited little excitement among code administrators if it had not been for the character and vigor of the dissenting opinion of Mr. Justice Clark. He was of the opinion ''That there will be a significant increase in refusals is certain and, as time goes on, that trend may well become a frightening reality. It is submitted that voluntary compliance cannot be depended upon.''[8] Mr. Justice Clark feared that great burdens would be placed on courts and that warrants would be issued in substantial numbers. ''This boxcar warrant will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more—with space for the street number to be inserted—and issued by magistrates in broadcast fashion as a matter of course.''[9] Justice Clark's fears focused in the specially designated areas for concentrated enforcement, but his logic is equally applicable to other parts of jurisdictions where warrants would be harder to get, and resistance, therefore, easier.

As Justice Clark viewed this impending calamity in the abuse of warrants he observed:

> In my view this will not only destroy its integrity but will degrade the magistrate issuing them and soon bring disrepute not only upon the practice but upon the judicial process. It will be very costly to the city in paperwork incident to the issuance of the paper warrants, in loss of time of inspectors and waste of time of magistrates and will result in more annoyance to the public. It will also be more burdensome to the occupant of the premises to be inspected. Under a search warrant the inspector may enter any time he chooses. Under the existing procedures he can enter only at reasonable times and invariably the convenience of the occupant is considered.[10]

Perhaps it is too early to evaluate the insight of Justice Clark.

As often happens, there are circumstances in the factual conditions between situations that make possible greater uniformity in principle than appears in the contrasting perspectives of Justices White and Clark. In the first place, it might be noted that the protective limitations in *Frank v. Maryland* to ensure consideration of the occupant of the home were greater than in *Camara*. Under the San Francisco code, authorized city employees ''so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.''[11] The majority of housing codes follow this pattern of no entry restrictions other than the ''reasonable time'' provision. Some of these add the condition that the inspector must possess proper credentials or some special identification. A few require that advance notice be given the occupants, the time varying from 72 hours—as in Duluth, Minnesota—to 14 days in the Dade County, Florida, code, but this is uncommon. The *Camara* type of ordinance is the prevailing one in the sample of more than 200 codes examined in this study.

This view is supported by a note in the DePaul Law Review: ''The majority of empowering statutes fail to meet even the minimum standards so extolled in *Frank*. Many codes fail to limit the time of inspection. Most have no ''cause'' requirement for entry (and)...in a survey of 50 ordinances only one demanded that a search be in a manner to cause a minimum of inconvenience to the owner or occupant.''[12]

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[7] Ibid., 540.

[8] Dissenting opinion of Mr. Justice Clark, 546, 553.

[9] Ibid., 554.

[10] Supra, 554, 555.

[11] San Francisco Housing Code, sec. 503.

The findings in this study do not, however, fully support this quotation. They rather emphasize the variety of provisions and the general lack of consideration of the issue involved. Only rarely does the code state that ''cause'' must be shown to support entry, yet in practice, area code enforcement, or intensive enforcement, is often accompained by preliminary publicity and work with community groups that attempts to lay the groundwork of understanding. Pamphlets are distributed explaining the program and preparing the way for the later visit of the inspector.[13] A few codes exhibit more than typical consideration for the occupant or owner and are perhaps worth noting.

Duluth, Minnesota, in addition to requiring 72 hours' notice, specifies that the inspection shall not have for its purpose the ''harassment of such owner or occupant,'' and should be made so as to cause the least inconvenience. The purpose of inspection is not to include ''the procurement of evidence to be used in any criminal proceedings.''[14] Most housing codes, however, rely upon misdemeanor penalties, by definition. These are properly classified as criminal. Dade County, Florida, limits inspection to the provisions of the housing ordinance, gives 14 days' notice to the occupant, and allows any affected person to file a written objection to such inspection up to 2 days before the inspection. The county manager is to review the objection and approve, cancel, or defer the inspection, his decision being final.[15]

The Housing Code of Vancouver, Washington, in addition to requiring proper credentials, requires a written request for admittance that shall ''outline the appellate procedure available to the owner or party in interest from any order of the Building Official or Appeals Commission as provided by this ordinance.''[16] This code also requires a warrant upon refusal of entry.

There is some reason to believe that collateral matters influenced the shift in values indicated in the 10 years between *Frank* and *Camara*. A more general application of the *Frank* permission of warrantless entry and searches seems evident. Especially in attempting to prevent, or punish, violations of welfare laws, the practice of what has become known as the ''welfare search'' expanded.[17]

In *Parrish v. Civil Service Commission*[18] some interesting and somewhat distressing practices were revealed. In these searches a welfare worker would go to the home of a welfare recipient late at night or early in the morning and knock at the front door. If he was allowed in, he would go to the rear and allow a fellow inspector to enter. Together they would search rooms, closets, and under beds. They were searching for unauthorized males in households receiving aid to dependent children. At the very least a vigorous questioning of the occupants was involved. Impending was the penalty that welfare allotments could be suspended. There seems no question but that reliance was placed upon the construction of *Frank* in these situations.

While time was passing between *Frank* and *Camara*, the Supreme Court was tightening requirements under the Fourth Amendment in other cases that were clearly related to the criminal investigation processes,[19] and these may well have had carryover effect.

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[12] ''Comment,'' *DePaul Law Review*, vol. 17, (1967), p. 217.

[13] For example, Bloomington, Ill. ''Evergreen No. 1'' program, as part of the city's 1965 CRP. Carbondale, Ill., also sends out a ''prevent blight'' pamphlet prior to concentrated enforcement--through the ''compliments of Real Estate Association of Carbondale.''

[14] Duluth Housing Code, sec. 29A-3(1) (1965).

[15] Ordinance No. 63-30, sec. 1.10 (1963). Ordinance No. 67-61, adopted Aug. 8, 1967, added a provision for the issuance of search warrants when consent for inspection was denied.

[16] Housing Ordinance No. M-514, sec. 10 (1960).

[17] See ''Warrantless Welfare Searches Violate Recipients 'Constitutional Rights,' '' 19 *Syracuse Law Review*, 96.

[18] 51 Cal. Rpts 589 (1966) The question of what constitutes ''consent'' and scope of search is inherent in this issue.

[19] Particularly *Mapp* v. *Ohio*, 367 U.S. 643, *Ker*, v. *California* 374 U.S. 23.

Justice White does not specifically say that warrants must be issued by any particular official, court or otherwise. He quotes *Johnson* v. *the U.S.* that ''When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement officer.''[20] Obviously White is not so much concerned with the issuing officer's holding a particular office as that he evidence certain qualities. He states:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area.[21]

There seems no insurmountable difficulty in meeting the criteria outlined by Justice White without falling into the potentially tremendous dangers envisioned by Justice Clark. Some of the elements noted by Justice White are within the control of the housing code administrator. There is no necessary relationship between an occupant's ''knowing whether enforcement of the municipal code involved requires inspection of his premises,''[22] and case-by-case consideration of application of code provisions. If the educational function adequately precedes the inspectional function and if the persuasive role of the inspector on a preliminary visit clearly reviews and explains and leaves information materials with the occupant as a condition to seeking future admittance, this condition seems to have been substantially met.

If Justice White is correct in his statement that the occupant has ''no way of knowing the lawful limits of the inspector's power to search,''[23] it is only because the administrative system of which the administrator is a key figure has failed to recognize principles in sound administration. There is a difference, in most cases, between knowing the inspector's power, and denial of admittance because of belief in privacy. The administration has a clear responsibility to see that the inspector is armed with credentials, including identification and scope of authority, and that this information is clearly communicated in both oral and printed form to the occupant. This should be conceived as a routine official duty of the inspector, not as a special dispensation when insisted upon by an occupant.

The issue of whether the facts support entry, with regular or ''special'' warrants, in Justice White's pronouncements, hinges primarily upon two factors. The first of these relates to the qualification of special area enforcement; this will be considered after attention has been given to the second factor. This factor relates to the matter of separating inspectional situations involving hazardous conditions or critical health emergencies from others. As to this Justice White wrote: ''since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a Warrant, that the law has traditionally upheld in emergency situations.''[24] There are two ways emergency situations can be approached in housing code administration. One is through careful definition of categories and the other is through procedures that ensure neutral examination of supporting evidence that an emergency exists before entry is pressed. These approaches are not mutually exclusive; competent administration uses both. If processes can be developed and maintained through which arbitrariness can be curbed, the dependency upon court review will be minimized.

Code writers, using the guidance resultant from administrative experience, are or should be responsible for careful definition of categories descriptive of nuisance-like and emergency conditions insofar as this is possible. Greater clarification can sometimes be given through the rule-making processes within the administrative system itself. The maximization of ''reasonableness'' in seeking entry for inspectional purposes is partly a code writer's problem and partly a responsibility of administrators. As much guidance as possible should be built into the code itself. Most codes examined have not given the degree of attention to this problem it deserves. The *Camara* decision will certainly provide both warning and guidance in this matter. A code should also give full attention to clarifying procedures that will maximize reasonableness and ensure protection of the interests of home occupants. This can be done, in part, through providing an appeal of resistant occupants to as neutral an official as possible before seeking a warrant.

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[20] *Camara,* 529 quoting 333 U.S. 10 at page 14.

[21] *Camara,* 532.

[22] Ibid.

[23] Ibid.

[24] Ibid., 539.

The issuance of a subpoena or a subpoena duces tecum is authorized in some codes relative to review boards. For example, the city of Little Rock, Arkansas, under its combined building and housing code provides: ''The Housing Board of Adjustment and Appeals shall have the power to issue subpoenas and subpoenas duces tecum when requested by either side when reasonably necessary to obtain pertinent evidence and any member of the Board shall have authority to administer oaths.''[25] How would this question be answered: An inspector is refused entrance. Could the occupant then be subpoened to testify as to the condition of the dwelling? Could the owner, if other than the occupant, be ordered to bring records as to previous official actions? And finally, could an inspector be resisted when he appears to verify the statements put in evidence?

Most codes provide for rule-making powers. Provision should be made to create authority and duty of administrators to have full discretion to maximize educational and persuasional processes to ensure minimum arbitrariness. There is justification that provisions considered in rule-making procedures relating to entry should involve open hearings, localized and informative in areas where communication is most difficult or enforcement given extraordinary priority. Camara will accomplish its major purpose if heed is given to its admonitions rather than if approach to the problem is one of response to an unsympathetic judiciary.

Warrants to enter and search are not necessarily exclusively subject to ''court'' issuance. The U.S. Commissioners have a long, and in general honorable, history in American law. Such an official ''is an adjunct of the court, possesses independent, though subordinate judicial powers of his own.''[26] Commissioners issue search warrants but derive their authority from Congressional legislation[27] and not from judicial delegation.

Although a general recommendation seems possible that the neutrality critical to both good administrative practice and Justice White's interpretation of the Constitution can be achieved through some experimental functionary akin to the U.S. Commissioner, the application of such a recommendation can only have vitality in relation to a particular state governmental process.[28] Whether neutrality can be achieved without being adjunct to a court seems possible, provided the official is sufficiently removed from the hierachy of command between the chief administrator and the inspector. Possibly this achievement is possible through combining the entry and search needs of all the regulative systems operative in local government, urban or nonurban, and the legislative creation of a general warrant officer. He might be appointed by a governor or by someone outside the local hierarchy if necessary.

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[25] Ordinance no. 11, 422; Part IV - Housing, 107.1 (C).

[26] *Gun* v. *Shine*, 187 U.S. 187.

[27] 28 USCA sec. 631-639; also 26 USCA sec. 3602; 18 USCA sec. 3184-5-6.

[28] The September, 1967, *Journal of Housing* reported that Wisconsin had enacted a new statute that ''all state, county, city, village and town officers or their agents or employees charged by statute or ordinance with inspection powers or duties are considered peace officers for the purpose of securing such special inspection warrants'' (p. 455). Warrants to inspect nonpublic buildings will be issued only after consent is refused.

It is arguable that the warrant-issuing official be sufficiently familiar with conditions under his immediate jurisdiction to recognize that the criteria of emergency cannot be fully achieved through objective definitions. Justice Clark, in dissenting in *Camara*, pointed out that violations or dangers cannot be detected from external observations of buildings. He cited impressive statistics and ratios of investigations to findings of violations. His conclusions should not be overlooked. At least there is good reason to believe that the Supreme Court will give every consideration to honest and competent efforts to achieve reasonableness in seeking entry, and respect efforts to develop and maintain the neutrality in passing judgment upon justification for entry.

There are two elements in *Camara;* analysis of the "entry" problem has been undertaken with less emphasis upon "law" than upon the implications for administration. The second element is "areas," and this can be treated, to some extent, separately. The two are too intertwined, however, to make separation complete in seeking to provide guidance to administrative processes.

Most codes are written to apply to a total jurisdictional area. Behind this policy is the principle that enforcement should be nondiscriminatory and uniform throughout the area covered by the regulatory provision. In this sense a city is an administrative area in which uniformity is expected; the city is distinguished from suburban or exurban areas. The jurisdiction of the total city area is the "normal" entity subject to code administration. But housing code inspection, as a matter of fact, does not uniformly cover cities or other local jurisdictions, and Justice White is well aware of this condition. He makes an important element in his opinion relate to the tendency to divide the cities into smaller areas in which "concentrated" or special focus of attention is given. Inevitably, this solution of intra-areas is a consequence of concentration of substandard dwellings in certain areas and of policies directed to improve selected area conditions, either as part of a long-term program or as "demonstration" projects. As Justice White observes: "the reasonable goals of code enforcement will be dealt a crushing blow" if special area inspection is eliminated.[29]

Justice White satisfied himself, and the other members of the Court's majority, that some way had to be found to approve special area inspectional concentrations and that these operations could be differentiated from citywide inspectional entry for purposes of reliance upon warrants. He decided:

> Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multiple-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. ... The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.[30]

Rereading this statement seems to leave the question of what is "obvious" uncertain. That the privacy of those in designated areas permits what Justice Clark calls "paper warrants" seems an unnecessary solution of the problem in that uniformity is sacrificed to standards that are, in turn, so uncertain that perhaps they merit judicial review just as much as an individual entry resistor does. At least Justice White sets no objective standards by which special areas are meritorious, although it becomes certain that entire cities are not subject to the same legislative findings as subareas within cities are.

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[29] *Camara*, 536.

[30] Ibid., 538, 539.

That there are difficulties in applying Justice White's interpretation of constitutional restraint is apparent. But these can work to the advantage of competent administrators as well as operate to deter incompetent ones. Again the issue centers around, as does much of the law's struggle toward rationality, ''reasonableness.''

How can reasonableness in area designations best be achieved in housing code administration? Part of the answer lies in state legislation; part in municipal ordinances; and, if these parts are competent, the final and most basic part lies in administrative or executive rule-making power and processes.

No argument is possible that code administration should be jurisdictionwide, in the face of current practice. This practice has, however, made housing codes a tool of urban redevelopment or renewal programs and as such the more intimate relationship to health standards have been largely subordinated. As these conditions have developed, it becomes increasingly necessary for legislation to delegate powers not easily included in blanket delegation of health and health-related police power upon which a substantial number if not a majority of housing codes rely. The area problem is more akin to land use zoning than to health criteria. Land use zoning includes an element of health, sanitation, and safety. But such regulative intervention is based more fundamentally upon economic protection of property values and upon an increasing regard for composite social values, including aesthetics.

Berman v. *Parker* advanced the validity of ''area'' based code enforcement. There is a strong presumption that the area represents a determination founded in administrative expertness and treated as a factual matter beyond judicial inquiry. ''It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project.''[31]

Housing codes are dependent upon area enforcement as tools to achieve the renewed city, and it behooves state legislators to consider areas as subject to the same safeguards in ensuring consideration of private rights as in zoning administration. This means professional planning counsel and area hearings after planning bodies of representative citizens have mulled over the recommendations of staff experts and made tentative decisions. It also means that decisions are deeply political, in the sense that city councils hold important keys to approval of changes in boundaries, exceptions or variances, and overall criteria.

It is recommended that the rule-making process, geared to area representation in special situations, and subject to public area hearings and with all of the paraphenalia of political review, be incorporated into the area-designating process and that it be considered akin to zoning but with a somewhat different overall objective. In this sense the day of considering housing codes as tools to utilization of health-science expertness to improve housing conditions has been superseded, and this should be clearly recognized.

Housing code administrators can influence but cannot remake the laws under which they operate. The determination of special areas to facilitate the renaissance of declining urban centers is a problem for interrelated action of legislative bodies. The major guidelines, for reasons of financial dependencies, are in Washington and will stay there in the foreseeable future. The state legislatures, pressed by local representatives, will enact legislation to accommodate Washington-determined policies. Few states have resources to experiment far beyond the choices proffered to them. All of these governmental agencies can be expected to give credence to the Supreme Court, and the Court has decreed that specially designated areas make warrant attainment simpler in housing code enforcement. Just how these areas are to be determined will find thrust from Urban Renewal policies. How much elbow room local politicians have, or will have, will be further conditioned by state legislatures. Just how much discretion local administrators can effectively use depends upon local political understandings tempered by availability of leaders able to coordinate and stimulate agreement patterns on urban program development.

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[31] *Berman* v. *Parker,* 384 U.S. 26, at page 35.

Faced with the almost overwhelming complexity of the relationship of areas to total city renewal it is unfortunate that housing code administration is essentially amateur, although experienced in the enforcement processes. No university system provides composite training in proportionate relationship to the complexities involved. As long as no effective combination of social, economic, and health expertness can integrate policy, and traditional land use planners face problems beyond the scope of their competence, the best reliance in a democratic society is upon consensus patterns. It is recommended, therefore, that housing code administrators confronted with both the limitations and opportunities derived from *Camara* reach as far as they can to make area determinations as much a product of political processes as possible, with emphasis upon area and neighborhood needs and involvement.

There is no certainty about the scope of *Camara*. The historical reversal of a five to four decision in *Frank*, by a six to three decision, not only leaves room for continued argument but also renders the issue itself less than clear cut. The right of emergency search, ''even without a warrant," remains intact but undefined beyond the accumulation of precedents. These precedents are not nicely in point. There is a question of whether the Fifth Amendment as well as the Fourth is involved; *Frank* considering it was and *Camara* that it was not. The more comprehensive perspective in *Frank* permitted Justice Frankfurter to distinguish between ''civil'' or ''protective'' searches: that housing code enforcement is part of a regulatory scheme that is essentially civil rather than criminal.

The San Francisco housing code is similar to many others. It is aimed at accomplishing inspections but takes into account the interests and accommodates the occupants. The inspector, according to the Municipal Code, ''shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.''[32] The facts indicate that the inspector acted in accordance with his instructions under the code. The facts relating to entry are extraordinary and relate to one of the most complex and most unsatisfactory problems in code administration: the mixed-use building. The inspector sought entry to a building in which a dwelling unit existed and was occupied contrary to the provisions of the code. The manager of the building made this disclosure to the inspector. Armed with this information (complaint?) the inspector confronted the appellant-occupant and was denied admittance. A second visit and a citation to appear at the district attorney's office followed with negative results. The California Municipal Code does not make particular provisions for resistance to entry, except to consider it to be a violation of the code, indistinguishable from other violations, and subject to misdemeanor penalties.

In *Frank*, the majority view considered that the Fourth Amendment was intended to protect against entry and search for proof of criminal conduct; to make the distinction involves overlooking the fact that refusal to admit the inspector was itself criminal under the code. It also involves overlooking the fact that violations found as a result of the inspection are likewise subject to criminal penalty. But the scheme of regulation, substantially based upon long practice, was considered controlling by Justice Frankfurter, and this scheme makes the intrusion of the inspector, with statutory and administrative guidance to minimize interference with occupant interests, part of a protective system. In *Frank*, the dissent, written by Justice Douglas, was not impressed with the distinction. Calling one interference with privacy ''civil'' or ''protective'' and another like interference ''criminal'' or ''punitive'' did not change the essential intrusion into the privacy of a home.[33] But in *Camara*, the minority position in *Frank* became the majority position; ''the extent that it sanctioned such warrantless inspections, must be overruled.''[34]

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[32] Supra.

Camara may prove another in a series clarifying entry and inspection for housing administration. It would seem that the statement of the building manager than an illegal use existed lifted the case out of the routine and created special justification for entry; perhaps this would have been more palatable to the court if greater protective coloration and covering existed in the administrative process. This aspect of the problem received little consideration beyond mention as a fact. If a more careful composite of measures designed to protect against unreasonable intrusions were assembled from other codes and administrative practices, and the disclosure of the building manager was considered as information construed as a notice of violation, some interesting questions can be raised. These are probably of more importance to administrators seeking foundations for effective yet legal action than to lawyers seeking consistencies with stated doctrines.

Suppose an inspector is admitted and finds a violation of the code. When he returns, armed with intentions and information to explain the violation and its significance, and how it can best be corrected, his admittance is denied. Must he get a warrant? Can he make a decision that there is an emergency based upon his knowledge as an expert? Can he report back to his chief and obtain confirmation that a hazard of the first magnitude warrants immediate action?

Suppose the housing code administrator, as part of a team concerned with determining special areas for concentrated rehabilitation, finds it desirable to survey, on a house-to-house basis, certain blocks to determine the facts relative to inclusion or exclusion in a special area. Suppose, further, that his report is the factual base upon which the mayor and city council intend to act in defining such special area. Still further, that citywide publicity and special house-to-house calls explaining the situation have been undertaken and that the inspector has made a preliminary call to make certain that the problem is understood and to find out the least inconvenient time for the inspection. The policy and the information given the occupant through all these media are that the inspection is to determine certain physical conditions. Justice White says it would be easier to get a warrant to inspect an area that has been determined; is a warrant necessary to determine this area under these conditions?

One of the principal findings of this analysis is that housing code administration is not producing an adequate body of information for policy and program development. The Urban Renewal programs, including code enforcement, coupled with the economic bind in which an increasing number of landlords offering low-rental housing find themselves, complicated by attempts to provide specialized housing in increasingly complex patterns, demonstrate the dearth of information relative to housing stock or supply in most cities. The housing code administration, relying upon information-collecting methods that are more nearly within its grasp than any other agency in local government, should become a fact-gathering system permitting knowledgeable policy decisions at the political level of government. The present author was involved in developing the methods used to determine ''substandardness'' in housing that have contributed to the contemporary approach in defining special areas for urban renewal consideration. In the course of experimentation it was discovered that no substitute for direct inspection can adequately achieve results relating to factual physical conditions in housing and household facilities. This analysis also recommends the development of licensing of low-rental housing to keep a regular check upon supply and categories of available resources. These purposes are not within the framework considered by Justice White; they involve inspection but are not intended to produce evidence of violation.

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[33] This problem is analyzed further in ''Enforcement of Municipal Housing Codes,'' a note in 78 *Harvard Law Review*, 801-809.

[34] *Camara*, 528.

When a statement is made about intention in making an inspection, it must not be considered in the public interest that inspectors are blind to discovery of hazardous situations. Discovery of a condition that leads the experienced inspector to conclude that an emergency exists should not lead to its being overlooked. But does it make sense that an administrative system seek a judicial decision, based upon information technically known and evaluated within the frame of the administrator's special competence, about whether an emergency exists and, hence, whether or not a warrant is required?

Camara, if construed to curb fact-gathering processes, comes at an unfortunate time. The conditions discovered in this study, which has approached code administration on a city-by-city basis, are evidenced otherwise. We have, apparently, a national shortage of information about housing supply and conditions. The 1970 census relative to collecting information about housing should be fundamental to governmental policies involving billions of dollars in expenditures. It has been proposed, however, that the house-by-house canvass upon which a trained census worker makes an evaluating report be superseded by a ''mail-back'' of data by the occupant. This places a burden where it can be least competently borne; there are too many illiterates and apathetic people in the ''worst'' housing where information is of the greatest importance. The leadership of NAHRO has sought the help of HUD to encourage surveys; presumably involving housing code administrators and their inspectional staff personnel.[35] ''He also urged that HUD and Census Bureau make an effort to delineate new, objective items that can be used to identify blight for inclusion in a mail-back census.''[36]

Is the threat implicit in *Camara* that a census taker would require a warrant to find out the basic facts about a house? Notice that, if no distinction can be made about the purpose of intrusion, unless there is such clear evidence that an administrator ignores the warrant procedure, the census taker or the inspector trying to find out the need for special area rehabilitation and concentrated and coordinated government action may well fall in the same status as the annual inspector trying to find out if code compliance is, or is not, being fulfilled.

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[35] *Journal of Housing*, vol. 25 (January 1968), p. 14.

[36] Ibid. Refers to NAHRO President Rafsky.

Chapter 10

INSPECTION TO HEARING: COUNSELING AND CONFERENCE

The appearance of a government inspector, housing code or other, can be expected to excite resistance. This is not likely to be reduced if the inspector is bent upon discovery of conditions that may be adverse to the financial interests of the occupant. Perhaps the tendency, so emphasized in the approach to housing code inspections, to place undue responsibility on landlords somewhat reflects this condition.

Educational campaigns can both increase and decrease the welcome extended to the inspector. As the tenant learns the scope and nature of his responsibilities, both to the state and to the property owner, his resistance will tend to be reduced when violations are outside of his but within the landlord's obligations. But he will not be made happier to see an inspector who will obtain official evidence of his own derelictions. This situation argues against the continued emphasis upon fact finding through intervention into homes upon official initiative. It gives support to a fact-finding system that puts the burden of disclosure, with penalty for misrepresentation, upon the occupant.

Once the inspector is in the dwelling, the occupant is entitled to reasonable explanation of the meaning of his findings. Some jurisdictions make a practice of having the inspector undertake explanations and perhaps leave a copy of his report with the occupant. The obtaining of occupant's initials or signature to the inspector's report is not unknown. It adds certainty to the record-building process that may or may not lead toward compulsion, although it may not always be enthusiastically endorsed by occupants, especially when violations are of their own making. Even when the violation is a landlord's responsibility, however, the tenant's signature is some assurance that no other violations existed as of the inspection date. In some cases this may give a degree of protection to landlords. At least a tenant or occupant-owner is entitled to what might be termed ''certification of compliance,'' and whether this is undertaken by the inspector directly or through notice from the administrator's office seems relatively unimportant.[1] Some merit may attach to making this compliance certificate of such character, especially in multi-dwelling unit buildings where all are in compliance, that it can be displayed in a foyer or other prominent place.

Binghamton, New York, includes the following Section 13 in its Housing Code:

> Section 13 Certificates of Compliance.
>
> 13.1 That upon request of the property owner, the Enforcement Officer shall issue a certificate of compliance setting forth that on the date of the said certificate, the building in question complied with all the terms and requirements of this ordinance. In the event that the said premises do not comply with all the terms and requirements of this ordinance, the Enforcement Officer shall issue a written statement setting forth in what manner

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[1] Sioux City, Iowa, uses both a form letter that notes compliance at the time of inspection and thanks the owner for his ''excellent cooperation,'' and a more formal ''certificate of compliance'' for buildings that is dated, signed by the Health Director, Housing Officer, and Mayor, and suitable for display.

> the terms and requirements of this ordinance are violated.[2]

A fee of 2 dollars is charged for this service.

In the sequence from inspector's report to disposition of a particular case lies the province of obtaining compliance. Since reports are stimulated from two sources an element attaches to one source that is not present relative to the other. This is the notification to a complainant that action has been taken and the complaint investigated and that official action is underway.[3] The other motivation of inspection is the programmed fact-gathering intervention into areas or as part of jurisdiction-wide policies. The follow-up sequence does not distinguish the initiating factor beyond this report, although the record system should yield information about action taken.

The channeling of inspector's findings is of great importance and goes a considerable distance to mark the patterns of good administration. The first and probably the most critical separation of inspector's findings is the sorting out of situations that are ''emergency'' or ''hazardous'' to a degree that immediate action is indicated. Immediate action means that the procedural system, devised and operated to ensure fairness and protection of individual rights, yields to intervention to protect against immediate dangers. This is the province of summary power, and codes do not distinguish its limits as well as they should. By failing to bound its scope, the separation of what might be called ''normal'' administration becomes uncertain and administrators must function with less guidance than desirable. Since personal liability, or some form of collective liability, attaches to misuse of power, close attention should be given in enabling legislation and responsibility-fixing enactments. Beyond this lies the fact that citizenry are entitled to certainty about their rights while unnecessary ambiguity in official standards works to the general disadvantage of both administrator and citizenry.

Normal or routine cases constitute the great majority of violations in inspector's reports. These divide into two main categories. There are those that involve discretionary competence outside of the code-enforcing administrative unit and those that are subject to responsible determination to disposition through compliance or transfer to a prosecuting officer. Even here the code administration must be prepared to supply necessary supplemental investigatory information and provide witnesses to give authority to records.

In the provision authorizing inspection, the Warren, Michigan, code states: ''For the purpose of inspections and compliance, the health officer may request the assistance of the electrical, plumbing, heating and building inspectors of the City of Warren to enable him to make the legal determination in his inspection.''[4] A recent innovation in St. Louis is their plan to use three specially trained inspectors as ''professional witnesses,''[5] in order to improve the working of their housing court systems. Atlanta, Georgia, in a section on ''technical assistance available,'' states that where such assistance is required ''in the preparation of any matter for presentation to the Court and in the actual presentation of said matter in any Court,'' the enforcement officer is authorized to request and to receive assistance from any department in the city.[6]

The Urban Renewal requirement of a workable program has been more influential in developing discrete administrative units than in providing coordinated programs. Since housing codes have spread over American cities as a factor in obtaining renewal projects, disjointure is widespread. There is little guidance relating to coordination, and serious interdepartmental

[2] Binghamton, N.Y., Housing Code, as amended to 1966.

[3] The Housing Code of Atchison, Kansas, provides that ''notice of such hearing (set up by Public Officer for violator) shall also be given to at least one of the persons signing any petition relating to such dwelling; any person desiring to do so may attend such hearing and give evidence relevant to the matter being heard...'' (Section 5 [a], Ordinance 4609, as amended to 1963).

[4] Ordinance No. 55, sec. 3.2 (1964).

[5] *Journal of Housing*, July 1968, ''Codes Notes,'' vol. 25, p. 308.

[6] Atlanta Housing Code, sec. 15-19. (1968).

friction is widespread. This affects housing code administration because housing codes, to be effective, presume operating regulative systems and in effect provide a unit constructed upon the foundation of other units.[7] These units particularly include building codes and construction expertness, health department's and sanitation controls, and fire prevention controls. Other agencies may be involved, but these three are inherently related and for practical purposes can be presumed to exist.

It should be emphasized that the scope and content of the inspector's report has a relationship to its intended use.

If inspectors' reports are to be used only as a record base to determine compliance, report forms can be relatively simple. But this overlooks the possibility of using inspector-gained data for coordinated program-planning purposes. Such reports can be a vital source of information about housing supplies and the characteristics of these resources. Obtaining such information, however, takes time, and this in turn involves a determination of costs and overall policies. It is not within the province of housing code administration to determine the use of its fact-gathering system for purposes beyond its immediate needs. With some exceptions codes make little provision or reflect little realization of the information potential available through fuller utilization of inspectional processes.

The administrative problem is how to use the specialized expertness in the related units. There is always a difficult problem in determining how far the expertness in housing code administration should use and not duplicate expert competence. Administratively this presents the question: Should an inspector's report disclosing a structrual deficiency under the provisions of the housing code be transferred to the building code administration? The same type question can be asked about a health or a fire code violation. Is the responsibility to obtain compliance transferable? No clear answers to these matters are disclosed in what has been discovered about practice, although the generalization seems possible that housing code administration does not fully use the existing expertness in local governments but tends to duplicate function with somewhat less adequately trained personnel.

Codes, or state enabling legislation, seldon give clear guidance on the relations with interrelated departments or other administrative units. They tend to presume that the entire sequence is self-contained. This creates unnecessary difficulty for both the code administration and for the political, administrative leadership of the local government. Some analytical consideration of the problem of what might be called the interunit aspect of housing code administration will be made, more to clarify the problems than to prescribe ''good practice.'' Not enough field work has been possible in this study to provide values or alternatives coupled with records, report forms, and use of data for program development involving interrelated agencies.

An example of a housing code recognizing the interdependency of expert units is evidenced in the following quotation:

> The conformity of any structure, installation, equipment or facilities to the requirements of this Housing Code shall be determined in accordance with the standards which are generally recognized and accepted as good practice in connection with residential housing at the time of such determination. The determination shall be made as follows:
>
> 1. by the Fire Chief, with respect to all requirements involving fire safety, fire protection, or the use, handling or storage

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[7] The following provision in the village of Mount Kisco, New York, Housing Code evidences careful use of referential standards: ''Sec. 7A-7. Reference to N.Y.S. Building Construction Code and other laws.

Installations, alterations and repairs to residential premises, and materials, assemblages and equipment utilized in connection therewith, shall be reasonably safe to persons and property, and in conformity with applicable statutes of the State of New York and orders, rules and regulations issued by authority thereof. Conformity of such work, materials, assemblies or equipment with the applicable requirements of the New York State Building Construction Code shall be prima facie evidence that the same is reasonably safe to persons and property.''

of fuels or other inflammable substances;

2. by the Plumbing Inspector, with respect to plumbing and sewage equipment, installations, fixtures and systems;
3. by the Village Engineer or the head of the Water Department of the Village, with respect to equipment, installations, fixtures or systems for the supply of water or for the use of water for drinking, cooking, bathing or swimming;
4. in all other cases by the Building Inspector.[8]

Just how is the fire chief, plumbing inspector, engineer, or building inspector going to find that responsibility has settled upon his office? And just how are the occupant and owner to know when and how this responsibility passed? And how is the housing code administrator to know what happened once the responsibility was transferred in accordance with his understandings? These questions can be answered much more easily in a village the size of Tarrytown than in a metropolis of hundreds of thousands or millions. What can be considered functional informality in small places must yield to formal distribution of responsibility in large ones.

Various attempts have been made to work out interagency communication and responsibility systems. An oversimplification of one in Providence, Rhode Island, is suggestive of a type of problem that is usually overlooked in codes and that cannot be examined through studying them. When an inspector's report discloses the problem of interagency relations it is classified according to the agency involved. A ''tickler file'' that uses colored tabs to identify the agency of referral is established and maintained. Inspectors' reports can be filed chronologically, by area, and the various referrals identified in a time unit and an area unit by inspection of the file. When a case is referred to an outside agency a tab indicates this fact. Its place in the file indicates both its time of origin and location. This makes possible a composite file in which open cases are distinguished by category and closed cases by the absence of tabs.

The problems involved are not solved as simply as a summary description of a file suggests. Let us suppose that a red tab indicates that the case has gone, through a duplicate of the inspector's report, to the building department. As long as the red tab appears on the jacket the case is considered open. How does it get closed? Suppose the building department reports that their inspector found no violation of the building code. Suppose the report back says that a promise has been exacted to undertake compliance. Does the housing administrator have a reinspection made? What if he gets a report of violation again? What if the housing inspector finds no evidence of work being undertaken in accordance with the alleged promise? Communications can become difficult and tempers strained. Another example shows the difficulty of closing a case. Suppose the building department reports compliance; that is, the owner obtained a permit and completed the necessary work. Should the housing code administrator have the tab removed or should he reinspect?

A housing code inspector may find a violation that involves construction. Let us assume that he considers this a relatively simple problem, but that it involves fire prevention standards and competence. The folder is tabbed, and the inspector's report copy moves to the fire department. The fire department reports back that compliance will cost considerable money and that the owner cannot be expected to make the outlay. Should the housing code administrator try to overrule the fire department and notify the owner to comply? Judgment that has been discovered cannot be removed from any file system.

Cities can achieve a degree of coordination in different ways. It can be achieved through a carefully planned system. Providence evidences this approach.[9] It can also be achieved with some success through the method used in Moline, Illinois. There is reason to believe that careful study of the internal functioning of numbers of cities might produce some models that relate to size of population. Certainly smaller units can achieve through informality what requires more formality in larger units. Moline is a city of some 43,000 population. Its coordinating approach is to put all the critical officials into one agency called "The Housing Code Enforcement Agency."[10]

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[8] Residential Housing Code, adopted February 25, 1963, in Tarrytown, New York.

Mr. Fred J. Siebenmann, Jr., comments on the way the system works:

> While administration of the Housing Ordinance is cumbersome, it has accomplished much improvement in Moline. It has afforded a weekly opportunity to meet and work with other municipal employees. This has broken down many barriers which used to reduce the Health Department's ability to function effectively. Now we treat a dwelling unit as a whole problem rather than just as a potential insect or rodent harborage.[11]

The Authority, or any of its members, is authorized to make inspections covering the entire scope of the Authority's jurisdiction. Notices of violation can be issued by any member. Such notices become orders if a written request is not filed with the Authority for a hearing. The Authority, or a quorum of its members, determines the existence of an emergency and can take direct action or order demolitions. The Authority hears cases in which one of their members is in effect the defending party, it keeps summary records and can make orders to vacate buildings, etc. It is also a rule-making body and as such submits its proposals to the city council. Nonaction by the city council within 30 days is deemed to constitute approval. "Any person or persons, jointly or severally aggrieved by any final order of the Housing Code Enforcement Authority," in the manner prescribed by state laws, may seek review by "the Courts."[12] The Authority may refer "human relations" problems to a Human Relations Commission, and the two bodies can meet together.

Just how the system works cannot be determined from the code itself. But further investigation evidences that all notices of violation emanate from the Health Department. Serious problems involving demolition of vacating buildings are referred to the Authority. As to the role of the related experts: "Less serious violations are merely handled by giving notice to the owner or tenant. ... A referral is then sent to the proper HCEA member (electrical inspector if the violation is one pertaining to his field). He, in this way, is alerted that someone will be in his office for a permit to do the required repairs."[13]

In larger cities a rule-making system is indicated that is interagency in its scope. Over a period of time, relationships should be codified insofar as this is in accord with changing conditions. Thus the rule-making system must recognize that it is a continuing activity and best functions through periodic examinations of working relationships.

The same pressures to find workable coordination is found in the very large jurisdictions. In Dade County, Florida, with one and one-quarter million population, an agency popularly called "Little HUD" brings together a cluster of administrators somewhat parallel to that comprising the Authority in Moline. The level of discussion, under the personal leadership of the county manager, permits a degree of informality unusual in such large units. The fact that the programs are somewhat unsettled creates opportunities for coordinating leadership but also potential confusion.

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[9] Chapter 1040, Providence, R.I., Housing Code, 1956, provides for the appointment of a housing coordinator, with specific duties, as well as a technical steering committee and a director of the Minimum Housing Standards Division, all appointed by the mayor (Sec. 2: Administration). Warwick, R.I., also uses a "Technical Advisory Committee." Its declared purpose is "to assist the Department of Health and the Division of Minimum Housing Standards in carrying out the duties of enforcing this ordinance." It consists of seven ex-officio city officials "a member of the City Council and such other City officios as the Mayor may appoint." It is chaired by the Superintendant of Health. (Minimum-Standard Housing Ordinance, 1959, sec. 2.7.)

[10] This list includes: health inspector, chairman; mayor, cochairman; building inspector; electrical inspector; heating inspector; plumbing inspector; fire inspector; city engineer; planning and zoning administrator; assistant building inspector; and the assistant planning and zoning administrator. Housing Ordinance, sec. 16.2, 1961, p. 18.

[11] Letter from Mr. Siebenmann, sanitation officer, May 31, 1968.

[12] Sec. 16.3.

[13] Letter from Mr. Siebenmann.

Little HUD is composed of Public Housing, Urban Renewal, Model Cities, Community Renewal Program, Relocation, and Minimum Housing Standards. The latter division, with a staff of 33, is subdivided into four units: (1) Inspection Section; (2) Compliance Section (responsible for processing all housing code cases in noncompliance and capable of initiating prosecution procedures); (3) Program Development Section (plans and programs activities under the Systematic Housing Compliance Program, gathers information for report purposes, and makes recommendations for changes in inspection priorities); and (4) Clerical Section (responsible for correspondence, filing, and controlling of all facets of the program).

The division conducts three separate housing code programs:

1. Systematic Housing Code Compliance Program in the city of Miami
2. Systematic Housing Code Compliance Program in the unincorporated area of Dade County
3. Interim Housing Code Compliance Program in the city of South Miami

It has been noted that ''An effective referral or 'action request' system has been established with other governmental units in order to achieve prompt response to matters outside the jurisdiction of the housing code.''[13] Inspections are conducted by teams of two inspectors. An automatic electrical typewriter types the list of housing code violations from the punched card that the inspector has prepared during his field inspection. When relocation as a result of housing code enforcement is pending, an ''action request'' is sent to the Relocation Division. Pertinent facts of age, income, and household information are gathered. If emergency rehousing of families is required, available public housing units are temporarily used.

The division believes that future plans to apply computer methods for data retrieval ''will assist in more effective programming of all activities including scheduling inspections, activities reporting and periodic revision of systematic inspection program priorities based on the relative conditions of housing.''[14]

The reorganization of the government of New York City along the same general lines, but with the very troublesome element of rent control, and jurisdiction to initiate receiverships added, has produced a combination of the following functions: code enforcement, buildings, rent control, renewal, relocation, housing construction, and rehabilitation.

It is noteworthy that the general or land planning is outside the combination as is the Health Department, which forms the spearhead of code enforcement in the English system and in many American cities.

Finally, the pressure to put the structural factors in housing code enforcement under an administrative headship covering building codes, which are primarily concerned with structural matters, has made headway in many Western cities. This combination tends to downgrade the ''human relations'' aspect of housing codes.

Another type of program is inherent in the interagency complex. Let us suppose that outside resources are made available for a special area code enforcement undertaking. Suppose half a dozen new inspectors, usually relatively untrained, are added to the housing administration staff. In some cities the development of ''intensified'' code enforcement has produced additional and entirely independent staff units. Consider what such action entails. The inspectors find more violations. More referrals are made. This overburdens the building, fire, health, and other involved units. They ask the mayor or political head for more staff. This creates budget problems and digging into reserves. The civil service, or personnel staff, becomes concerned. Temporary employees capable of doing the various technical jobs are unavailable on short notice, and the expected duration of the project does not warrant training costs. Regular employees feel threatened and usually can see little, if any, warrant for the presumption of crisis that has been evidenced by the increased and sharply focused funds and demands usually from outside sources. Violation reports pile up. The legal counsel feels overwhelmed. Amateur inspectors produce inadequate reports. Cases stall, recriminations run rampant. Usually, in such situations, the net result may have immediate political support, but the long-term effect may be closer to disaster.

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[13] *Organization and Administration of the Minimum Housing Code Program*, May 1968 (Metropolitan Dade County, Department of Housing and Urban Development), p. 3.

[14] Ibid., p. 8

In Louisville, and Jefferson County, a more sophisticated system of record keeping, the McBee system, seems to be giving satisfaction. Computerization is in the offing. The problem deserves further study, but this cannot be done without extensive field work and enough time spent in each system examined to evaluate it in terms of its special setting.

The use of automated record control and retrieval systems will provide means and constitute a pressure to extend the fact-gathering process in housing code administration toward more effective and broader program planning. In 1965 Baltimore introduced a data processing system involving housing code enforcement activities. A quotation from its procedures manual indicates the conceptualization upon which it is based:

> The development of an up-to-date sophisticated data processing system is of supreme importance to any housing enforcement agency charged with the responsibility of maintaining decent and standard housing in urban areas. It enables the housing agency to operate in broad, diversified programs while applying good control, indicating future direction and providing critical data of various types.[15]

The Baltimore approach does not fully recognize the possibility of acquiring and using housing code data for broader social planning. It is a system designed to expedite administrative processes in the conventional sense.

Cases that involve intergency relations also involve communication with housing occupants and owners about the reason for the shift in emphasis and, under some conditions, for responsible owner or occupant behavior. For instance, the inspector's report that shows a violation involving a structural deficiency may indicate a type situation in which the owner should be informed that he must seek a permit from the building department before he can undertake compliance. This relationship is inevitable if a new room or bathroom is indicated. There is merit in the housing code administration's undertaking a counseling and advising function. Both the development and maintenance of cooperative relations are important to the housing administrator-citizen as well as to the administrator-building official. There is enough trouble inherent in a system that finds an inspector in one agency notifying a citizen that he must deal with a new agency, not as a substitute relation, but as an additional one.

Counseling and Conference

The counseling system in housing code enforcement is generally given little consideration in codes, although it is of the highest importance in the administrative processes. Some attention has been given this matter in the discussion of persuasion and education.[16] In connection with the enforcement system, however, a somewhat specialized counseling and conference problem deserves attention.

Most larger jurisdictional units make some effort to recognize two somewhat distinct ways of advising violators. Some are more concerned with the inspector's undertaking the counseling service; some with a more formal use of office conferences. Others use somewhat indeterminate combinations of the two. It is important, however, once the function is undertaken, that it be given the status it deserves.

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[15] *Data Processing: Procedures Manual for Housing Codes Enforcement*. Department of Public Works, Bureau of Building Inspection, Baltimore, Maryland (January, 1966), p. 1.

[16] See chapter 8.

When a violation is found that involves expenditure of money, and the plea of hardship is encountered, this fact should become known at an early phase in the enforcement processes. Two kinds of help can be offered. One centers around obtaining loans or grants that might fit circumstances. The spacing of expenditures over a time period will sometimes help. It is not unknown for administrators to admit relaxation of requirements in matters that have little effect upon health or safety. Nor is this practice subject to disapproval in this study. Counseling can be extended to discussion about how the money can best be used. This discussion leads into the other kind of advice-that can be given. How can the repair or construction be made to meet minimum standards and keep costs at a minimum? An experienced person can sometimes suggest alternatives, particularly if he is conversant with code interpretations.[17] Although there is danger in recommending contractors, this is not impossible if the enforcement office keeps some kind of records on contractor experiences. Collaboration with chambers of commerce or some other agency able to evaluate competence of different contractors in different specialties has merit in protecting small landlords and old and infirm owner-occupants. There are recurrent reports of incompetent contractors and craftsmen and of some outrageous overcharging practices. Counseling should extend to providing services and assume that the purpose is essentially the obtaining of compliance.

Counseling should extend to working with owners to reduce the problem of compliance with discovered violations to the point permitting application for permits if these are necessary. It is not necessary, however, that this be done in the housing administration conference facilities. But if the housing code administration is to certify compliance it directly or indirectly should face the responsibility of seeing that the violator has guidance in sketching plans for meeting terms of compliance. In other words, notifying an ignorant or economically embarrassed violator that he must comply—or else—is not enough to satisfy standards of good housing code administration.

Another aspect of counseling, or a type of activity that combines education, persuasion, and counseling, is reported by Mr. Cavanaugh, Philadelphia's Deputy Managing Director for Housing. In the December 1967 *Journal of Housing*, he noted the relative effectiveness of extending the counseling services into neighborhoods: ''First of all, the code enforcing agency is enabled to staff a neighborhood office with sufficient and appropriate personnel to serve constructively the rehabilitation, and to some degree the social needs of the community. ... A different kind of relationship can be developed between an enforcing agency and the neighborhood through early meetings acquainting the residents with the significance and benefits of the program.''[18] Presumably such a neighborhood program would include facilitating compliance through advice and making known such avenues of assistance as exist. It is possible that the Model Cities projects can develop this approach further.

The basic difficulty with housing code administration of special concern at this stage in the compliance system is that provisions are inappropriately based upon criminal penalties to compel performance. The potential violators fall into three main categories. The largest category contains low-income and low-rent-paying tenants. As a class they are almost immune

[17] One reported case involved an order to make all doors self-closing. The owner, about to invest thousands of dollars in the replacement of doors, an expense too great for his limited income, was at the last minute informed that all he had to do was purchase springs at 50 cents each and install them (as reported by Louis Wesler, ''Licensing Housing Management,'' *Journal of Housing*, vol. 24, September, 1967, p. 449).

[18] p. 630.

from fines or financial penalties. Such fines would reduce their minimum standard of living, and the system is not prepared to impose penalties in the face of this situation. Moreover, they are largely culturally and often educationally illiterate, and the premise of willfulness based upon understanding is not easily established and is dangerously ignored if our traditions are to be respected. A second large category of violators contains owner-occupants. This category predominates in smaller places. Usually violation is not a result of lack of concern for the physical environment in which they live, as is so often the case with despondent tenants in large cities. The hard cases involve retired or disabled people who are without resources to meet escalating standards or even to meet necessary repairs. The problem is essentially economic and can hardly be mitigated by fines or jail sentences. The third category of violators is made up of landlords. As enforcement progresses, the ability of landlords to comply and still make a profit declines, at least among renters to low-rent tenants. A counseling system should seek to determine some of the basic economic facts in all three cases before sanctions are considered.

An almost universal recognition of these economic issues is present among experienced code administrators, as is the general recognition that the possibility of profit from welfare allocation rent payment and on-going capacity to maintain code standards is unlikely. The counseling system must be considered to start with the inspector's approach to the occupant or landlord. The inspector should be given clear understanding of the dangers that lie in compulsion, and his very employment should be conditioned by recognition that he must try to find solutions within the available resources. The attempt to keep direct contacts with alleged violators must extend as far into the enforcement processes as can be made possible.

The most successful code compliance systems have been the ones best able to develop counseling and conferences and minimize compulsion. When an administrator complains that he cannot get municipal attorney action or that the courts are antagonistic--and these assertions are surprisingly common--there is reason to examine his counseling and conference system, or its absence.

Counseling code violators or holding conferences in which efforts are made to find some way out of the situations in which they find themselves, especially to find possible places where loans can be had or where volunteer help can be made available, or even where inspectors can provide supervisory assistance and lend a hand, is a puzzling dilemma. Fair-minded and sensitive officials become all too aware of the basic injustices of a system that provides fines for being poor and allows tenants and vandals to destroy property when no redress or compensation is available. They must sit idly by when tenants, with evidence beyond contestability, find living quarters made almost uninhabitable by other tenants, when no other housing can be found. A numbness to emotional response must be cultivated when one is asked to turn an old couple into the streets because they cannot afford a bathroom, even though medical evidence suggest that such a facility would provide hazard beyond convenience.

Housing codes cannot be equitably or decently enforced as long as the economic equation is missing. It must be built into the equation of compliance and not considered irrelevant. The lesson must be learned that a landlord losing money cannot be helped with a loan when his chances of rent increases are chimerical. Government is bent upon a program of social justice and improvement of appearance and livability of cities. It is high time that the rebuilding of cities be framed in considerations of individual responsibility and personal justice. Emphasis on ''areas'' and the ''socially disadvantaged'' has its place. But that place is so subordinate to individual justice that these considerations are not measurable on the same scale. The great tradition of our law is based upon personal responsibility and upon process to ensure its achievement. Housing code administration is, in this perspective, demonstrably destructive.

So the counselor faces the violator. Is he justified in conspiring to circumvent the injustice in the ''system?'' Is his problem, in its humanitarian aspects, to find solution so that the law will not take its course? Must he be forced to overlook violations to attain justice in a sense that is compatible with our heritage? Such questions should never have to be asked but as one studies housing code administration they cannot be avoided. From this perspective a high regard is accorded those administrations who have accomplished much with as little recourse to penalties as is humanly possible.

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As is the case in other situations, the presentation of a type of case example or case study seems more appropriate than successions of admonitions and commentary. Consider the approach in New Orleans.

This is a summary exposition of a city's attack upon a slum area. The undertaking was, and is, unencumbered by Urban Renewal intervention. It was generated from local interest and pride under a housing code that was spontaneously a result of local impulse to improve conditions. The code was not adopted to get money from Washington. The transition from adoption to enforcement is relatively simpler when public understanding is sufficient to provide foundation for political legislative enactment. Circumstances such as these do not necessarily produce cooperative zeal conducive to community acceptance, but it is more likely than when the code is part of a package tied to demolition monies.

The special project attack area summarized in footnote 19 might be described as an aftermath of unsuccessful enforcement processes using a somewhat standardized approach through reliance upon criminal court prosecution for violations. The city adopted a new housing code in January 1967. An estimated 60,000 dilapidated dwelling units existed. The number of inspectors was increased from 15 to 20. The first 65 cases brought before the court resulted in 33 dismissals. Thirty-two were pending when the report was made.[19] There had been no convictions at all.

The Irish Channel target area is a rundown section in New Orleans, covering 53 blocks with one side bounded by the Mississippi. The average rent is $60 to $90 per month. It is primarily single- or double-frame houses, but with some multiple-dwelling units with as many as 20 households. There were piles of junk and old cars scattered through the area when the project started. Some vacant lots existed, but not in immediately usable shape for recreational purposes.

Probably the most significant factor in the project is the competent zeal of Mr. Walter Randall, inspector for the Division of Housing Improvement, and the confidence and discretion placed in his initiative by Mr. Chris Bellone, the Division's administrator. Randall's attack on the problem was multifold. He undertook a block-by-block survey in the heart of the area to classify the houses as viewed from the street. He lived in the project area and worked both to develop and participate in community organizations. He found an ally in a neighborhood development center that derived support from OEO. His approach was to give advice, instruction, and personal assistance to tenants and encourage maintenance skills. He avoided threats of compulsion insofar as possible.

The street view inspection survey covering 985 houses tabulated into 336 ''good,''

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[19] *Journal of Housing*, vol. 24 (October 1967), 516. In a letter from Christopher J. Bellone, administrator of the Division of Housing Improvement as of August 15, 1968, a comment is made about the extraordinary difficulties in obtaining interdepartmental cooperation. The police department construed its authority to enforce an eviction order only in situations that amounted to nuisance conditions; premises must be ''classified as unfit for human habitation—such as roof in a near state of collapse, or walls which are buckling to the point where they could be termed hazardous.'' A commentary on this situation is that the ability to determine the type conditions in terms of expert competence belongs to the health department or the building department. This is the first situation reported in which the police department passes judgment upon building safety. The housing code seems to be in bad repute among other administrators among whom cooperative effort is necessary for success. ''We have found,'' wrote Mr. Bellone, ''that the Electrical Inspection Section will not enforce installation of a wall switch since this is not part of the National Electrical Code.'' Section 30-38 of the Housing Code seems to be ''rated'' below an earlier adoption of the electrical code provisions. Antagonisms of this type, even though uncommon, illustrate the interdependency relationships upon which housing code administration rests.

526 ''fair,'' and 123 ''bad.'' The bad ones obviously needed immediate major repairs. This survey covered some 20 percent of the total area. Attention was then focused on the bad houses, and house-to-house inspections were undertaken. Tenant action was emphasized, and the report covering the period stated that ''owners have been contacted in each case where tenants have completed repairs.''[20] To give further emphasis to the attack Randall's inspection reports were not ''formally filed with City Hall until every tenant has made an effort. ... It has become a joint neighborhood effort rather than what is seen as an attack on an owner by City Hall. ... Now when Randall inspects one house he inspects every house in the square to encourage residents to compete and cooperate with one another re repairing their homes and fences.''[21]

Three months after he started this intensive campaign, repair work was reported in progress in 143 housing units, either by owner or tenant or both. Attention was given to a broader consideration of the neighborhood environment. Trash was hauled away by residents and ''the Sanitation Department has cooperated by making a special garbage crew available to pick up the remainder from the street as needed in each block.''[22]

In Randall's follow-up inspections, which constitute original inspections of the dwelling interiors, he covers a broad range of subject matter including interior and exterior matters, plumbing, electrical or mechanical defects, and health or occupancy violations. Important to the success of stimulating occupant action is the coordinated educational program. This includes news media in the form of a series of ''mimeographed news sheets circulated to roughly 1,900 persons in the area''[23] through a neighborhood organization. These ''St. Thomas Newsletters'' explained and listed conditions tenants must meet as well as explained Mr. Randall's involvement. A local television station filmed a 1-hour documentary on housing in New Orleans and highlighted the Irish Channel neighborhood; a news reporter provided a feature series for the women's section from a human interest perspective.

The progress report states:

> Education begins with the community organizer's knock on a tenant's door notifying him of the violations he must correct as identified in the survey. Or it may take place at a bull-session with his neighbors at a local block council meeting in which Mr. Randall participates. Tenants are instructed in their own interests since the newly formed landlord's association, the ''New Orleans Property Association'' has initiated a city-wide referral system. If a tenant continues to abuse property, he may find himself slated for slum conditions as long as he lives in New Orleans. Once he has been made aware of his responsibilities in maintenance and has complied with them, however, it will be difficult for an owner to place a tenant on ''the blacklist.'' Tenant education is thus a keystone of the Division of Housing Improvement's code enforcement program in the Irish Channel.[24]

This cooperative relation between landlords and code administrator is most unusual and certainly has elements in it that deserve watching. It involves a system of classification of responsible and irresponsible tenants in which the sanctional system is subject to official scrutiny on a voluntary basis.

The Irish Channel project is too new to be evaluated. Can the enthusiasm of Mr. Randall be sufficiently rewarded to keep vital? Can the cooperative system in which the notification of violation is made by the neighborhood association member be sustained after novelty wears off? What happens when a tenant does his part and a landlord is unresponsive? What if the landlord cannot make the expenditure and find it profitable? These and other questions must remain unanswered at present. But the attempt to overcome the police-type orientation that is proving so devastating in American cities is at least given sharp focus in an approach that seeks code compliance through civic interest.

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[20] Progress Report, July 31, 1968, p. 2, New Orleans Division of Housing Improvement and ICAP Drive Against Blight in the Irish Channel Target Area.

[21] Ibid., p. 4.

[22] Ibid., p. 3.

[23] Ibid., p. 7

[24] Ibid.

Chapter 11
POST COUNSELING: A CRITIQUE

This chapter provides a commentary upon the way hearings are used in housing code administration with a purpose of illustrating various places and emphases in the administrative processes. It is intended as a base for a more effective system than now exists. The proposals made in the three following chapters classify hearings into three different uses, each separate and distinct from the other two. In order to provide a framework against which the commentary in this chapter differs from the recommendations, the three purposes of hearings are summarized.

1. Hearings, usually public, are means through which the general provisions of statutes are made instruments or definitions capable of effective enforcement. Such hearings involve varied qualities in participation. The two most important clusters of participants are officials interrelated with housing code enforcement and experts and interest representatives drawn from the community or jurisdiction. Such hearings are important educational devices. This subject is developed in Chapter 14.
2. Hearings that permit the amelioration of conflict between landlords and tenants through clarification of mutual or reciprocal obligations can be established and sanctioned. Such hearings are not well developed or are practically nonexistent at present. They are focused upon civil rather than criminal remedies and center around a legally trained judge but permit participation in the dispute settlement processes of neighborhood residents. Chapter 13 considers this problem.
3. Hearings through which responsibilities owed to the state (with violations subject to criminal penalties or other adverse determinations) are given an opportunity to be publically considered in particular cases. Such hearings are the final stage before transfer of records to prosecutory agencies. They provide review of development of particular cases and clarification of issues involved and permit examination, cross-examination, and confrontation of principals and witnesses. They make records that should be supportive of illegal action and of criminal intent. This hearing problem is considered in the next chapter.

It is the considered conclusion of this study that none of the three hearing functions are well performed at present and that much of the basic difficulty so generally recognized lies in the inadequacy of the present approach and in misuse of hearings.

At present what has been described as the counseling and conference phase of code administration is usually followed by threat and, administratively, by the turning of cases over to prosecutors. The cases as received into the hands of prosecutors are not in good shape to support criminal court criteria. ''Criminal courts are unwilling to recognize housing violations as true 'crimes' and in the traditional sense, this is not an indefensible attitude.''[1] An administrative process should be structured and staffed to separate those cases that are properly ''criminal'' and should provide evidentiary proof of both the offense and the intent. This problem is related to two of the trilogy of hearings: policy and rule-making hearings, wherein greater specificity of definitions derived from performance standards are sometimes, but not always, possible; and compliance hearings, in which the record can entertain the evidence relative to ''hardship'' as it conditions capacity for ''intent'' and can establish the record of official behaviors to demonstrate full consideration for the facts and interests of the individuals. In the third hearing type, a kind of ''poor man's civil agency of justice'' can hopefully be brought into existence to fill a void that has become increasingly apparent as the law of landlord and tenant has been modified by the provisions of housing codes.

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[1] Judah Gribetz and Frank Grad, Excerpts from speech presented at the Sixth National Codes Workshop, *Journal of Housing*, vol. 23, No. 9 (1966), p. 513.

Criminal Penalty

Although housing codes have unfortunately become almost completely dependent upon criminal enforcement processes, the administrative sequences have not been designed to meet the essential conditions precedent to such processes. Nor is it arguable that the criminal sanction be eliminated. It has a valid place in situations in which the public interest is best approached through this stringent method. But in imposing criminal penalty, tradition requires proof, beyond a reasonable doubt, of two factors—act and intent. Insofar as an administrative system is designed to use criminal sanctions, it must recognize the relationship between success and likely results.

Use of criminal penalty requires a sifting of cases. In some the elements necessarily proved may be proved. In others it may not be so simple. At any rate the proof of violation gives relatively little difficulty. It is in the problem of proof of intent that the system fails. So obvious is this failure that it need not be belabored. When Jason Nathan assumed responsibility for the Housing and Development Administration in New York City, he found 800,000 code violations accumulated in the records. In October 1966, Gribetz and Grad reported on this situation.

> In New York City we bring some 20,000 prosecutions for housing violations every year, most of them in a special part of the criminal courts. Note that each of the prosecutions involves several separate counts of violation and may involve as many as 60 to 100 separate violations. And yet, in 1965, the average fine was said to be about fifty cents. Many violations so penalized will have been outstanding for months, if not years, and many of them are of a hazardous nature. It should be added that these inconsequential penalties are not the result of inadequate provisions in the law; on the contrary, the law of New York allows the imposition of very heavy fines, ranging [illegible] to $1,000 per violation for repeat offenders, and it also provides for jail sentences up to six months.[2]

In New Orleans only four fines, totaling $125, have been imposed by the courts in the last 9 years. The housing code had 20 inspectors in 1967. A comment in the *Tulane Law Review* considers that this number should be at least tripled, without suggestions on how this would increase the competence of cases being referred to courts. It is noted that ''the Division simply has not done a good job of screening out 'hardship cases.'[3] The assumption is implicit that hardship cases are not properly subjected to court-imposed penalties.

In 1927 an article in the *Political Science Quarterly* called attention to the economic factor.[4] In 1953, a report by Siegel and Brooks to a Subcommittee on Urban Redevelopment, Rehabilitation, and Conservation of the President's Advisory Committee on Government Housing Policies and Programs entitled ''Slum Prevention through Conservation and Rehabilitation'' pressed the issue effectively. Slayton and Woodbury added their voices.

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[2] Ibid., p. 512. See also an article in *Columbia Law Review*, LXVI, pp. 1254-1290, by the same authors.

[3] ''The Enforcement of the New Orleans Housing Code—an Analysis of Present Problems, and Suggestions for Improvement,'' *Tulane Law Review*, XLII, No. 3 (April 1968), 615.

[4] James Ford, ''The Enforcement of Housing Legislation,'' *Political Science Quarterly*, XLII, 549.

After listing what are relatively ordinary factors curtailing housing code enforcement, such as lack of funds and staff, dispersion of responsibilities among several agencies or bureaus, reliance upon complaints rather than upon area inspections, lack of relocations for displaced persons, Guandolo concluded his list with ''the inability of the home owner to pay the cost of repairing and altering a deteriorated house or of the tenant to pay the higher rents resulting from the additional capital expenditures which a landlord would have to make.''[5] This summary, made in 1956, is adequate to describe the situation found in the present study.

When the early recognition of economic factors in the improvement of housing is considered it is something of a mystery why so much uncritical faith and encouragement have been given to the criminal penalty foundation to housing code administration. In 1936 the New York City Housing Authority recognized that ''the ultimate clearance and rebuilding of the city's extensive slums...could only be carried out through government assistance in the form of subsidies or grants.''[6] The lesson was obvious even at that time. In 1935, following a number of fires resulting in deaths, a bill was passed requiring fire-retarding structures in old-law tenements and ''a toilet for every family.'' A primary motive was elimination of old-law tenements through closing and demolition; ''they constitute the first real weapon with which to close up many of these old law tenements because the expense involved in complying with these laws, plus those passed in 1929, will be so great that the owners will prefer to abandon their houses rather than make the expenditures.''[7] From this vantage point of more than 30 years ago, Brownsville is a consequence of deliberate policy.

Although the American Public Health Association's ''Proposed Housing Ordinance'' of 1952 has played an almost overwhelming role in the orienting of housing codes, some of the important admonitions conditioning that proposal have been ignored.

> The Subcommittee believes it is important for the local health officer and other inspectors of building jointly to formulate a detailed written policy statement setting forth the character of those safety items which are to be dealt with directly by the health officer and those which are to be routinely referred to other officials for enforcement. The content of such a policy statement is the very foundation upon which avoidance of needless reinspections and inter-agency conflicts can be based.[8]

The subcommittee also emphasized the need for legal counsel, particularly in the manner and form of making rules or regulations and in the prescription of penalties for violation.[9] The subcommittee, however, deserves credit and responsibility for placing the emphasis upon criminal penalties, although it recognized the possibilities of civil actions and of administrative officials' taking action to bring properties into compliance and causing a lien to be placed against the property.[10]

Use of Hearings

There was considerable discussion about the use of hearings in the meetings of the subcommittee. There were, and still are, different methods by which transfer of responsibility for enforcement moves from the administrative to the prosecuting official. Except in a very large city or other local jurisdiction, it was, and still is, presumed that the prosecuting official is, outside the hierarchical pattern of responsibility of the housing code administrator. This was, and is, unfortunate. The sequential process of fact finding, counseling, and preparation of cases for court review becomes disjointed. When the potential number of cases involved and the need for record demonstration of violation and intent are considered, this disjointure should be avoided, even at the cost of making administrative jurisdictions large enough to sustain the full-time function of legal counsel.

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[5] Joseph Guandolo, ''Housing Codes in Urban Renewal,'' *George Washington Law Review*, XXV, p. 13.

[6] *The Failure of Housing Regulation*, a publication of the New York City Housing Authority (1936), p. 18.

[7] Ibid., p. 14.

[8] A Proposed Housing Ordinance, 1952, American Public Health Association, p. XV.

[9] Ibid., p. X.

[10] Ibid.

The development of the ordinance published in 1952 was essentially a thrust from health administrators, who recognized that something more was needed beyond a simple transfer to the prosecuting officer of the inspector's report together with the refusal of the reluctant owner or tenant. Some argued that there should be a review body or board of appeals outside the immediate policy control of the administrator. The difficulty encountered and policy agreed upon was that the separation of expertness critical to administrative success in such a board of appeals was excessively disruptive of responsible operations. The final agreement appears in section 3 of the ordinance. Opportunity was provided for a hearing before the health officer, who was presumed to embody the expertness most applicable to balancing the complex matters at issue. This decision is reflected in the subcommittee chairman's statement: ''The hygiene of housing is a broad and complex branch of the realm of environmental health. Into its fabric are woven a wide variety of health, safety, economic, general social and political factors.''[11] But the dominant belief was that the core of protective expertness was in the health officer rather than in a board of appeals and that staff advisory services could accommodate the public interest more effectively than competing approaches could. In other words, the hearing process should be conceived as a balancing of interests within the administration rather than be assumed to be outside the administrative processes; in effect this concept makes the administrative agency a party to an adversary proceeding.

Impact of Urban Renewal

The formulation of the subcommittee's ordinance, which has had such a profound effect upon housing codes and their administration, was not made in contemplation of the development on a substantial scale of what has become the Urban Renewal program within HUD. This development has had impact that was observed with clarity as early as 1956 but that has been largely ignored.

To a considerable extent the confusion that has developed relative to the problem of combining justice and escalated housing standards can be credited to Mr. Justice Douglas in his failure to recognize the basic distinction between police power and the power of eminent domain. This was in 1954 in *Berman* v. *Parker*. This case involved the exercise of eminent domain under The Housing Act of 1949 for redevelopment of an area in the District of Columbia. His approach really subordinates the use of eminent domain power to the police power. After commenting upon the uncertain sweep of police power, which is primarily a matter for legislative definition rather than judicial, he made the extraordinary statement: ''This principle admits of no exception merely because the power of eminent domain is involved.''[12]

A perceptive analysis of ''Housing Codes in Urban Renewal'' in 1956 reviewed the traditional judicial doctrines relative to the similarities and differences between the two power concepts. Mr. Guandolo concluded: ''The ultimate test will be that of reasonableness. In general, the payment of just compensation may make valid what otherwise might be invalid, and what is valid under the police power would appear to be valid under the eminent domain power because in the latter instance the property's owner's anguish is at least partially assuaged with just compensation.''[13]

The housing code administration's mission is to improve housing conditions rather than punish violators. Although not recommended in the 1952 ordinance, so much of which has appeared and reappeared in codes scattered throughout the country, the out-of-agency ''appeals board'' has made headway. Three third-year students at the

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[11] Ibid., p. IX.

[12] *Berman* v. *Parker*, 348 U.S. 26 (1954), at p. 32.

[13] Op cit. p. 28.

Harvard Law School, with editorial assistance, conducted approximately 130 interviews relative to enforcement of municipal housing codes. Their results were published in 1965. They determined that:

> A person served with a notice of violation may challenge the existence of the violation or the reasonableness of the compliance period in a hearing before a housing board of appeals. Because these boards have no power to impose sanctions, and because there is usually no dispute as to the existence of a violation, the right to administrative appeal has been little used.[14]

They noted that exceptions existed; in 1963 in Philadelphia, where a review board has jurisdiction over other than housing code violations, the board heard 302 housing appeals, in which 212 ''variances'' were granted.[15] Such review agencies are usually confronted with pleas of hardship. They usually can modify, affirm, or set aside, in one way or another, where literal application of code provisions would result in ''unnecessary hardship.'' This discretion to waive standards in hardship cases somewhat parallels the authority of a prosecuting official to decide which cases to prosecute. Even after such hearings, which usually do not produce record evidence, the prosecutor's discretion continues.

An amazing chapter in the recent history of housing code administration has been the increasing intervention of HUD into local matters. The overriding purpose seems to be penalty enforcement. HUD issues what it calls ''guidelines''[16] and sometimes these are paternalistic advice with a veiled threat and at other times they are edicts. Whatever their educational values, they undermine local responsibility, and no attempt is made to ensure that they advance either a national or local public interest. Certainly they bypass states and have little or no concern for impact upon state policy or programs. They simply assume that the local governments are subordinate to national policy and that HUD is the agent for such policy.

Guidelines G-11 is worthy of special analysis. Apparently, the Secretary of HUD has decided that experimentation with local codes is getting so out of hand that it should be brought to heel.

> Housing Code—Criteria for Adoption.
>
> To be deemed adequate by the Secretary, a housing code must (1) be the latest published edition of one of the nationally recognized model housing codes or (2) be a State or locally developed housing code which contains technical and administrative provisions that are reasonably comparable to those in the latest published editions of the model codes, and (3) contain the following provisions, whether or not these are provided for in the model code adopted or used as a guide:
>
> (a) Be fully applicable, from the date of its adoption, to all housing in the community, regardless of when or under what code such housing was originally constructed.
>
> (b) Require a fully equipped bath and toilet facility for every dwelling unit.
>
> (c) Provide for an adequate means of egress.
>
> (d) Provide for an effective administrative and appeals procedure.[17]

The G-11 requirements went into effect as of September 2, 1967, and had not been in operation long enough for them to be adequately evaluated. The use of edicts is difficult to assess in American government,[18] especially when they are not based upon solid understanding of the relationship between means and ends.

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[14] ''Enforcement of Municipal Housing Codes,'' *Harvard Law Review*, LXXVIII (1965), 814.

[15] Ibid.

[16] There is also Guidelines G-9 ''Housing Code Compliance During the First Year Following Adoption of the Code.'' See: Guidelines G-2 ''Codes Administration—Budgeting and Staffing, November 8, 1962; G-8, ''Systematic Housing Code Compliance, revised December 6, 1965. G-8 was revised, with forms for reporting required data as of November 11, 1966. The agency will supply approved recommended provisions for adoption upon request of local agencies.

[17] Guidelines G-11, November, 1966.

Now what did the Secretary of the DHUD, Mr. Weaver, have in mind? Unless he is conniving with the private code makers, he asks either for acceptance in localities of the pre-November 1966 standards or for acceptance of provisions he has never seen. Can the head of a department in Washington exercise the omniscience to approve before he has observed? Could a city find its money stopped because they adopted the original provision? Or the revision? It will be admitted that the edict power of Mr. Weaver might be extended to requiring provisions he has seen, but it is uncertain whether or not he could force a city council to adopt provisions, after they are published, which the council does not need to read or which the head of Urban Renewal has not looked at. Somehow this type of procedure seems incompatible with the most elementary concepts of local democracy and is at best contemptible of the role of states in the Federal system.

HUD's enthusiasm for the privately made codes, which are sold to governmental units, is not new, even if it is not easily explained. Under the circumstances it is considered pernicious, at least relative to the institutionalization of appeals boards. ''Guidelines'' does not make clear just what is included within the charmed sphere of makers of local codes under the auspices of HUD. Previous experience, however, would seem to indicate that there are three: Building Officials of America, headquartered in Washington, D.C.; International in Los Angeles; and Southern Congress in Atlanta, Georgia. They were all building code purveyors when Urban Renewal was born. They immediately saw possibilities of adding housing codes to their services. None of the three had the basic staff competence to evaluate or keep up-to-date codes that were products of composite competencies centered around public health expertness. This did not act as a deterrent. They simply copied the patterns and much of the language of the APHA code, varying detail enough to evidence special consideration. The building code systems these outfits offered included a review board. And so they simply decided that the board's jurisdiction could be expanded. But reconsideration related to the November, 1966, G-11 edict caused at least two of the three to provide separate appeals boards. HUD's action seems deplorable and should be reversed to encourage local and state experimentation.

Any review of administrative action will reflect the viewpoints and perspectives of the reviewers. Building code administration has attempted to use boards of appeal, and when the private code makers entered the field to achieve a combination of building and housing code administration, the simplest approach was to combine appellate functions in the existing board. But the building code board of review should be focused upon structural safety and keyed to engineering expertness. Building code appeals usually involve interpretation—or application—of relative specification standards. In this they are different from the typical appeal under housing codes.

Housing code appeals seldom contest the interpretation of inspector's findings. They have proved relatively ineffective in providing a forum for challenges to the code's validity. The review of housing code cases primarily centers around pleas of hardship. If the problem stopped here, the housing code review and zoning review issues would be similar. But housing code problems are different. In the first place the housing code is centered around health and social values rather than around structural safety. When a board of appeals ''works'' it becomes a balancing system in which hardship is measured in the scales of the available housing at comparable price levels, the degree of danger to health and health-related matters that is involved in the case, and the capacity of the owner to meet costs and still make a profit. These are not problems to be thrust upon boards designed to determine whether buildings are physically safe or whether construction meets structural standards.

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[18] If the Secretary of HUD is a ''delegate'' of legislative authority the maxim ''delegatus non potest delegare'' covers the situation. Webster defines the word delegate to include deputy, commissioner, or representative. The concept seems clearly applicable to the head of a department acting under authorization of Congress. The idea is not novel; it is deeply engrained in our tradition. In *Shelton* v. *United States*, 165 Fed 2d 241 (C.A.D.C. 1947) in wartime ''delegation of authority took place four times'' but did not end up in nongovernmental hands. The court carefully concluded that ''the successive delegation of authority from one to another of the Executive Officers of the Board was both entirely consistent with the intent of Congress as expressed in the Act of July 2, 1940 as amended by the Act of June 30, 1942, and lawful.''

The difficulty in combining a dual function of building code and housing code review in a single board is illustrated in Chicago.[19] Here, as in other cities, an attempt toward resolution of the code enforcement problem has been made by combining the inspectional, counseling, preprosecutory, and the administrative review functions. Such a system will not develop a smooth movement of cases through a sequence and separate those cases in which the plea of hardship can be evaluated before the use of court processes is sought. Cases in which an honest proof of intent cannot be sustained should not be prosecuted in criminal courts, with the objective of enforcing a criminal penalty. And intent that is forced because compliance is possible only without hope of reasonable profit is not free intent; it is based upon a degree of compulsion that really poses this question: Would you rather comply and operate with little or no profit or face penalty? However this is answered, the building in question can be expected to face deterioration and eventual abandonment. It is in the administrative processes of housing code compliance that such a separation of cases should be made. There are limits to the use of criminal penalty. The changing of names of categories, such as making out that the same ends can be reached by changing the name ''criminal'' to ''civil'' is spurious and hypocritical.

Hearing Systems

No attempt is made to describe completely the present use of hearing bodies. Some interesting experimental approaches are in evidence, and it is to be hoped that the heavy fist of HUD will not superimpose a system that cannot be expected to accomplish any of the three purposes for which hearings are adept, and abort the values that are slowly emerging.

One type of experiment attempts to combine two functions in one body. These dual-purpose boards both give advice on policy matters and hear appeals in individual cases.[20] A private code company selling its product is well geared to untrained and relatively unprofessional units; it is not to the advantage of the purveyor to find challenge to his recommendations, and the use of policy and rule-making boards or hearing processes will normally be most useful in making local adaptations to local conditions. Both HUD and the private code makers can find common ground in seeking dependency upon codes that will be made so that the stamp of uniformity is easy to come by. There is trouble, however, in attempting to combine the policy and rule-making functions with the appeal function.

Review bodies, usually called appeals boards, are composed of members selected in one of two value patterns, or a combination of both. The problems of housing code policy and administration and interrelationships with other local agencies can well be approached through representation of officials of these other units. A second problem is representation of the expertness available in the jurisdiction. Boards are frequently assembled under codes specifying such categories. Common are provisions requiring an architect, contractor, representative of the financial community, a builder, etc. Boards obviously tend to get excessively large if both the officials involved in interagency relations and representatives from outside are combined. More recently an enthusiasm is becoming evidenced to add minority groups one way or another.

It is very common for housing codes to provide some kind of appeal process. A substantial number use a single hearing officer rather than a multiheaded agency.[21] Of course such an approach is useful in making a record and ascertaining that interested parties can be given consideration. Single-member appellate agencies are of little use in rule making, except conducting complex hearings and making findings and possibly recommendations. They are not so used; single-headed appellate hearing processes are considered vehicles in approaching the enforcement of penalties. If the officer in charge of the hearing knows his law and the expectancies of the courts who sit above him, he can be a significant vehicle to improve success in enforcing penalties.

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[19] No health official serves on the Chicago Board of Appeals. The Building Board of Review consists of representatives of the Department of Buildings, and the Fire Department, a council member of the Committee on Buildings and Zoning, a licensed architect or licensed structural engineer, and a recognized fire prevention engineer (ch. 13 of Chicago Municipal Code, sec. 20-6.1, amended to 1967).

[20] Honolulu, Hawaii, Housing Code (ord. 2404) provides for such an advisory-hearing board.

Hearings, which culminate administrative processes and provide foundation for prosecution and court enforcement of penalties, should be competent to consider and evaluate facts. They should make credible conclusions based upon data disclosed in the official record. Such records should reveal the historical evolution of each case from its inception. The Providence, R.I., Housing Code reaches in these directions:

> Proceedings of the Board shall be conclusive with respect to questions of fact and may be reviewed only on questions of law by courts of competent jurisdiction as provided in Section 5.17 of this Ordinance.[22]
>
> All decisions of the Board shall be in writing. The Board shall keep clear and detailed minutes of all its proceedings including its decisions and the reasons therefor and the vote of each member participating therein and the absence of a member or his failure to vote. Such record, immediately following the Board's decision, shall be filed in the office of the Board and shall be a public record. Notice of the Board's decision shall be promptly furnished to the appelant, his representative, any person who has filed a written entry of appearance, and to the Director, and the Director shall take immediate action in accordance with the decision of the Board.[23]

Another type of experimentation, especially in smaller administrative units, involves what might be described as a two-step appeal system. This approach has merit. It permits a set of facts to be viewed somewhat differently from diverse vantage points. The question of whether or not hardship exists is not the same as the question of whether or not a case has a record base with supporting evidence to demonstrate the fact of noncompliance and the intent so to act. If these elements can be separated through a two-step system and dealt with effectively, such experimentation should be encouraged. Section 16.2 of the Gainesville, Georgia, Housing Code authorizes any affected person to request and to be granted a hearing before the Better Housing Coordinator. It also provides that:

> Notwithstanding the above provisions concerning the duties and authorities of the Better Housing Coordinator, any owner or occupant affected by the action of the Better Housing Coordinator may make application for hearing before the Housing Board of Adjustment and Appeal as prescribed in Section 17.[24]

Another sequence uses hearings by a Board of Adjustment and Appeal as an advisory stage between the notice following the inspector's report and the determination of cases by the head of the administrative agency. The relevant provision as found in Dublin, Georgia, is:

> Any person affected by any notice which has been issued in connection with the enforcement of any provision of this Ordinance, or of any rule or regulation adopted thereto, may request and shall be granted a hearing on the matter before the

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[21] Fairfield, Connecticut, Health and Sanitary Regulations authorizes the Director of Health to inspect dwellings, send notices and orders, and any person affected by any such notice "may request and shall be granted a hearing on the matter before the Director of Health..." (2.2), and "Any person aggrieved by the decision of the Director of Health may seek relief therefrom, as provided by the laws of this State" (2.4).

[22] Providence, R.I., Minimum Housing Standards, ch. 1040, sec. 5.14 (1956).

[23] Ibid., sec. 5.16.

[24] Gainesville, Georgia, Building Inspection Codes, Section V: Housing sec. 16.4 (1962).

> Board of Adjustments and Appeals... (sec. 3.2) After such hearing, the Building Inspector shall sustain, modify, or withdraw the notice, depending on his findings as to whether the provisions...have been complied with (sec. 3.3).[25]

The way the Dublin provision is drafted makes the Board's jurisdiction uncertain. It can hear cases relative to any rule or regulation, which would seem to make possible consideration of the issue of hardship. If the Board considers this issue, its function is essentially advisory. The decision-making power is in the Building Inspector. However, the ambiguous nature of the ordinance is not necessarily a defect. It might become the basis of an effective coordination of rule-making and decision-making processes. Experimentation is warranted in seeking coordinated action. While no attempt has been made to reach statistical determinations, to some extent because of the variety of detail that defeats comparability, a recurrent number of two-step processes are in use, possibly in as many as 7 to 10 percent of the systems examined. A somewhat higher percentage of systems use appeals to courts directly from single hearing officer systems. Hearing officers, in some cases, can reach findings and make recommendations or decisions subject to review by appeals boards. A significant element in the wide-ranging experimentation is the lack of incorporation of legal counseling in the processes that so directly affect personal and property rights. The controlling theory and practice seems to consider that the role of the lawyer, at least in smaller jurisdictions, becomes relevant after the hearings or review boards have done their work. The lawyer takes over after the administrative processes have been completed. This is unsound administrative practice and can be cured only by changes in enabling legislation or codes.

Two types of situation should be encouraged if housing code administration is to become effectively integrated into state-local systems. One is illustrated in New Hampshire. The enforcement agency for code enforcement is fixed by state statute. The city of Concord finds that its housing code is enforced by a ''public agency,'' which is a board defined by state statute. This same body acts as a review body. It is required to hold public hearings before orders may be entered.[26] Cases can be appealed from such a hearing to the mayor and board of alderman. What happens if HUD considers this approach inappropriate to obtain Urban Renewal funds?

The second type of experimentation that should be encouraged is the reaching toward larger units of administration in which the expertness essential to function can be achieved and through which suburban and exurban areas can be approached. Such situations are likely to produce something more than routine solutions. In this regard, the experiment in Marion County, Indiana, illustrates elements worth noting. Created as an independent unit of government in 1951 under state legislation, the Marion County Health and Hospital Corporation comprises three divisions. The Division of Public Health enforces the minimum standards for housing in the Bureau of Environmental Sanitation. Upon determination of violation, a notice having the usual characteristics, that is, being in writing, giving reasons for issuance, allowing ''reasonable time'' for compliance, providing an outline of remedial action that if taken will effect compliance, and supplying specifications of how service shall take place, is served. Then the code provides,

> Any person affected by any such notice issued by the Health Officer may request and shall be granted a hearing on the matter before the Health Officer, or in his absence, the Chief of the Bureau of Environmental Sanitation, of the Health and Hospital Corporation of Marion County, Indiana, provided that such person shall file in the office of the Health Officer, within ten days after the service of the notice, a written petition requesting said hearing and setting forth a brief statement of the grounds therefor.

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[25] Dublin, Georgia, Housing Ordinance (1963).

[26] *See Philbrick v. White,* 211 Atl. 2d 852 (1965).

> Upon receipt of such petition, the Health Officer shall arrange a time and place for such hearing and shall give the petitioner written notice thereof. Such hearing shall be held as soon as practicable after the receipt of the request therefor. At such hearing the petitioner shall be given the opportunity to be heard and to show cause why such notice should not be complied with.[27]

The hearing officer is authorized to sustain, modify, or withdraw the notice. Provision is made for reducing the proceedings, findings, and decisions to writing and entering these as public records. There is provision for direct appeal to a court; any aggrieved person "may seek relief therefrom in any court of competent jurisdiction, as provided by the laws of this state" (3.3 and 3.4).

The process described is really an enforcement or compliance hearing; the notice does not become an order if the appeal, so called, is taken. The order results from the hearing if it is made part of the process by the alleged violator. This can be termed the way "routine cases" are handled in regard to hearings.

But another route is provided "whenever the Health Officer finds that an emergency exists which requires immediate action to protect the public health." He may, "without notice or hearing, issue an order reciting the existence of such an emergency and requiring that such action be taken as he deems necessary to meet the emergency. Notwithstanding the other provisions of this ordinance, such order shall be effective immediately"(3.5).

The person to whom the emergency order is issued must comply in order to attain a hearing: "Any person to whom such order is directed shall comply therewith immediately, but upon petition to the Health Officer shall be afforded a hearing as soon as possible" (3.5). This hearing is before the same hearing officers as a routine case is, subject to an administrative appeal. Any person aggrieved or dissatisfied with the results of the hearing before the Health Officer or Chief of Environmental Sanitation shall be entitled to an appeal to the Board of Trustees of the Health and Hospital Corporation. This appeal is conditioned in time and method, but the jurisdiction of the Board of Trustees is "to vary, change, or alter the orders of the Health Officer or the Chief of Environmental Sanitation, and provisions of this ordinance if, in the opinion of such Board such rulings or provisions constitute an undue hardship" (3.5).

The board is delegated two different types of power. One is standard; it can affirm, modify, or reverse the decision of the hearing officer. But the second type is challenging and relatively unique. The board not only may relax standards but also may alter the provisions of the ordinance in hardship cases. This is possible only when the board has the same authority base as the code-making authority.

That the system has been little used is not unexpected. The processes of changing the code or the rules and regulations should be formal and involve open hearings. A criticism of most codes is that they do not sufficiently recognize the machinery and processes of rule making and responsibility for proposing amendments. Here, however, the criticism runs differently. The code recognizes the need for adaptation but does not recognize the character of the problem. Such changes are political and require open policy-making approaches. Codes and rules and regulations should be prospective in operation; they should not permit change in particular cases. Guided relaxation of standards should not be confused with change in standards. Changes should involve public participation after notice and hearings, or action by legislative bodies. But the Marion County system does not come to grips with the hardship issue. Perhaps no system can do so (except to sort out enforceable court cases) without resources to provide subsidy. The discussion of the Marion County system is designed to clarify issues rather than to indicate avenues for their solution.

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[27] Health and Hospital Corporation of Marion County, Indiana: General Ordinance No. 1, 1968, sec. 3.2.

In retrospect it will be seen that there is no clear ability of the enforcement hearing officer to relax requirements for hardship, although in summary action cases this capacity exists in the appellate board. The use of staff expertness would be more effective if the question of hardship was considered in the enforcement hearing in routine cases. It is not recommended that the administrative review of the enforcement hearing be expanded. This review would simply provide duplication, and the only significant factor in the usual administrative processes is economic burden or hardship. This is clearly recognized in the provision for board review of summary action cases. There is, however, no good reason why the board could not use the expert testimony of its own staff in determining hardship. More successful court review would result if in routine cases the staff expertness on hardship is on the record, if the hearing officer's opinion and decision recognize this testimony and supporting data, and if the record made subject to court review covers the background through which the case arose as well as the processes and substantive data upon which decision rests.

Correspondence with Mr. Albert L. Klatte, director of the Bureau of Environmental Sanitation, adds further light on the operational aspects of the Marion County system. Relative to the routine enforcement hearing, which the code provides before consideration by court review, Mr. Klatte wrote: ''For years we have given any person the right to appeal for a hearing on any order issued by an employee of the Health and Hospital Corporation. In twelve years I have noted one such appeal for a hearing. Furthermore, we have not had any person appeal to the courts for relief.''[28]

The provisions in codes, as in Marion County, often do not give a very adequate representation of what transpires. The code simply provides for court appeals, but Mr. Klatte wrote:

> In our enforcement procedures we use injunctive means of enforcement on our more serious violations. Those of a serious nature do get a hearing before a court and it is generally only those violations of a less serious nature such as garbage disposal, etc., where we file affidavits under the criminal law. ... The numerous so-called hearings which we have perhaps is a misnomer since they generally consist of an office conference with the affected person. We have found through experience that by getting a person out of his environment that they are generally more cooperative and in about 74% of the cases we can solve what seems to be insurmountable problems with an office conference.[29]

This comment seems pertinent. Marion County calls counseling and conference ''hearings.'' The code provision that appeals from hearings go to courts is a statement of theory. An appeal is allowed from what is in reality a counseling and conference process to a board; if challenged this ''right'' would probably not be considered more than a privilege. The alleged right of appeal seems to satisfy the interests of the parties, although it is so seldom used that it constitutes a form of safety value that probably relieves pressure before it builds up. And to cap the situation, the administration uses equitable relief, which is a remedy provided in some place other than in the code itself.

In evaluating the Marion County system, which evidences a more complex approach than most, it might be worthwhile to suggest that the counseling system be more clearly provided in the code if the code is to guide citizen behavior and that the enforcement hearing be developed to provide a more nearly complete record of official behavior and supporting data. The reliance upon injunctive remedies has the merit of being effective as well as of mitigating the evil of reliance upon the criminal penalties provided as the expected compliance system in the code. It is of the greatest importance to realize, in evaluating a system in a state, such as Indiana, which has a state administrative procedures act, that local appellate procedures have usually been influenced by general state legislation and that whatever is found in codes must be considered with circumspection.[30]

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[28] Letter to the author, dated May 29, 1968.

[29] Ibid.

Eminently successful examples of housing code systems, such as those of Marion County and Evansville, Indiana, have not relied upon the criminal sanctional systems so copiously provided in codes. Such systems elevate the counseling and conference phase of enforcement and minimize criminal sanctions. But such an approach will eventually run into trouble if there are substantial numbers of low-income, low-rent payers. At some stage, as enforcement gradually exhausts its capacity to persuade and economic self-interest of landlords rises increasingly to the surface, the use of compulsion must be faced. If the administrative system provides a full record of what has been done to mitigate the landlord faced with profitless buildings on his hands, there may well be significant advantages to use of equitable court jurisdiction. Even so, the basic economic issue must be considered.

As in any system using administrative expertness, court review should provide optimum consideration for the factual evaluation of such experts. This is made difficult in housing code administration for a number of reasons. The range of expertness expected to be brought to bear is extraordinarily great. No well-established educational, research, and training system has been developed to correspond with this needed range of expertness. One is tempted to consider that the regulation of housing, particularly low-rental housing, is becoming or has already become essentially a form of public utility in some of its aspects.

In public utility regulation it is usually presumed that the administrative agency makes a determination of facts, evaluates them, and makes findings that provide evidentiary support to conclusions that support decisions. A long struggle has ensued in which the utility regulation systems have acquired a presumptive capacity of decision making and judicial recognition that evidence-supported decisions are entitled to be considered nonreviewable except in regard to jurisdiction and adequacy of support. In dealing with hardship cases, questions of fair return and confiscation of properties through rulings that operate to make such returns improbable have been consistently considered within the court's jurisdiction.

Political Reviews

When policies are being critically evaluated and when standards are uncertain, a substantial case can be made for providing some form of review of difficult policy matters before local legislative bodies. The merit of court review lies in the capacity to impose settled norms against willful violators. But the imposition of housing codes on local jurisdictions creates situations in which the concensus patterns cannot honestly be said to support values underlying housing code provisions. Some experimentation to sort out types of cases that clearly illuminate unsettled policies seems desirable. In other words, the simple approach of administrative determination to court review may, or may not, be the efficacious solution to housing code experimentation.

A number of cities consider that the political appeal is desirable. Provisions found in the Galesburg and Springfield, Illinois, and Duluth, Minnesota, codes suggest that this approach finds favor in the Middle West. In this part of the nation, the pressure of older housing is not so great, and the acceptance of housing codes is correspondingly less enthusiastic. Appeals to political bodies are possible, even from boards of appeal. Most code enforcement systems assume that finality of administrative decisions represents successful administration; there is good ground to doubt the validity of this presumption in situations in which public acceptance is not substantial. Forcing acceptance of unwanted and resisted policies is not a mark of success by which HUD should be measured. The provisions of the Winder, Georgia, Code seem worth noting:

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[30] Appreciation is expressed to Warren C. Moberly for a long and carefully written letter explaining the operating system. He is counsel for the Health and Hospital Corporation, and the outstanding success of the program has, in part, been the result of his extraordinary interest and guidance. The need for such legal counseling is noticeable in most enforcement systems, and programs would be improved if directly attached and interested counsel could be made staff officers.

"Any person aggrieved by the decision of the Board of Appeals may seek relief therefrom from the Mayor and City Council. ..."[31]

A summary of critical observations relative to contemporary housing code administration supports the conclusion that the most effective programs of compliance have subordinated or ignored the criminal sanctional process that is designed as the base of compliance attainment. Except in smaller places, the reliance upon educational and counseling processes can be considered no more than stopgap solutions. They will run into the chilling facts of economics in due course, and administrative systems should be so designed. But the relatively indiscriminate attempt to use criminal sanctions will be unsuccessful or will defeat values that are equally or more valuable than better housing for the poor.

Popular enthusiasms as emotional thrust ensconced in political trappings tend to run their course. Left over are the difficult problem issues. In housing code administration these matters increasingly rise to the surface, and the contention of this analysis is that the machinery in us is poorly designed to cope with them. Administrators seek remedies outside the machinery of criminal penalties. Legislatures, reflecting dissatisfied reform groups, turn to bypassing the housing code machinery. Illustrating this, the recent Michigan enactment[32] incorporating use of receiverships is a clear example. This disrupts policies and will be found more of a handicap than an advantage. There is no honest way of avoiding the economic issues, but the separation of responsibilities and the respect for proper use of criminal processes can be better attained through reconstruction of the machinery and its procedures.

[31] Sec. 3.5 Minimum Standards Housing Ordinance, Winder, Georgia (1963).

[32] Introduced as House Bill 3188, section 112, in the Michigan legislature, March 16, 1967, and recently enacted.

Chapter 12

COMPLIANCE HEARINGS

Three different hearing processes are considered essential to housing code administration, although this does not necessarily mean that three different hearing agencies are necessary. Two of the three are designed as processes subordinate to judicial review in the regular courts; the third, concerned with rule making, may, on occasion, become involved in litigation. Each of the three hearing processes is considered in separate chapters. This chapter is concerned with what is termed a compliance hearing.[1]

Compliance hearings are courtlike processes. They are the final procedural stage in the chain of enforcement behaviors that reach from the inspector's report to turning records over to public prosecutors in cases where administrative disposition of a particular case has proved unavailing. Presiding officers in compliance hearings are lawyers or legally trained officials able to preside over procedures that can be described as meeting standards comparable with expectancies of the Administrative Procedure Act of 1946, or with a state enactment of similar character. It is not expected that such hearings will be considered appellate from previous decisions. The right to a hearing is a normal part of the enforcement sequence. The notice of violation specifies this right and that it can be waived if certain steps are not taken. Waiver shall be considered evidence of violation but not of willful intent, unless a second notice makes clear that intent shall be construed prima facie from nonaction. Since the compliance hearing is part of the regular machinery of enforcement it must be presumed that the expertness available in the administrative staff reinforces the presentation of the case for the administrator.

A primary function of the compliance hearing, and of the hearing officer, is to separate hardship cases from others. Hardship should be more explicitly defined in the codes than is the case at present. The elements in the definition, whether defined by code or through decision making, should include (1) opportunity for a reasonable profit, (2) prudent management, and (3) forecast of rent return. The burden is placed upon the administration to counter the claim or plea of hardship. If hardship is not demonstrated, the compliance hearing is charged with establishing evidentiary proof, beyond a reasonable doubt, that the violation exists in fact and that the party responsible for compliance willfully refuses to so comply. The affirmative duty to establish mens rea, or the equivalent, is with the administration. It cannot exist unless the noncompliance is based upon free will; free will cannot exist in a capitalistic economy without reasonable expectancy of opportunity to make a fair profit. Once both the facts of noncompliance and willful intent are established on the record the case is ready to be transferred to the public prosecutor.

If, in court review, new or additional facts are sought to be presented by the alleged violator, the court shall deny his right to make the presentation and shall refer the case, with instructions, back to the compliance hearing officer. In effect the present "appeals board" function is eliminated. The interest balancing by

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[1] Because some interrelationships exist among the three processes, chapters 12-15, should be considered as a unit in outlining a post-counseling administrative program.

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amateurs, analogous to the function of a board of appeals in a zoning case, is inappropriate in housing code administration.

The compliance hearing proposed in this study must not be confused with experimentation with ''housing courts.'' One of the reasons for adoption of the term ''compliance hearing'' is to avoid this confusion. The typical housing court is simply a judge assigned from a regular court, usually a municipal court, and serving for a period of time. The assignment is not popular. Five judges who had served on the Baltimore Housing Court estimated that it took at least six months to understand the complexities of housing code enforcement. The authors of the analytical study in the *Harvard Law Review* suggested; ''To make a long term more palatable, housing cases might be divided among several judges, none hearing housing cases exclusively.''[2] This would mean that judges are even less immersed in the complexities than could be expected in less than 6 months' service.

The cases brought before housing courts are not prepared in the same perspective as recommended in the compliance hearings. The housing court is not part of the administration that is able to expect staff cooperative action in preparing and sustaining a case. Such courts are simply special divisions of regular courts. They place the same burden on inspectors, even when inspector's reports are prima facie evidence of violation as in Chicago. Continuances are granted easily. Complaining witnesses rarely appear, especially after a continuance has been granted. The opinions generated in this study lead to the conclusion that the unfortunate circumstances of landlords and the reliance upon promises by tenants in the relatively small number of cases against them are the underlying explanation for postponements and light sentences.

Probably the most noticeable improvement that could be expected in the compliance hearing over the housing court system lies in the use of counsel. In the housing courts the counsel is part of the staff of the corporation or municipal counsel's office. His responsibility begins when the administrative processes place a case in his hands. It is not to be wondered at that the HLR study found that the corporation counsel shared this ''compliance attitude'' with the judges as demonstrated in his requests for continuances, nonsuits, and fines.[3] An important element in the compliance hearing system is that legal counsel be integral elements in the preparation of cases and that they have responsibility for overseeing preparation, from providing guidance in preparation of inspection reports through the counseling processes, and specifically in the preparation of cases for compliance hearings. Cases would not become responsibilities of municipal or corporation counsel until determination had been made by the compliance hearing officer. This perspective requires development of code enforcement administrative units of a size able to use counsel and other experts not now normally part of staff. But code enforcement imposes burdens that can be effectively met in no other way.

Since the plea of hardship, if rejected, leaves the violator open to criminal penalty, the competence of the hearing officer must extend to capacity to evaluate consequences of his decision. Depending upon staff competence, he must determine whether the public health, safety, or wellbeing is sufficiently involved for him to relax or enforce the ordinary standard of hardship. From this perspective it would be quite possible to extend compliance hearing jurisdiction to all cases, except emergency cases in which even the time involved for a hearing must be considered a public danger. The legal dilemmas confronting the compliance hearing officer are most difficult and involve grave issues of property and criminal liability and of determining the meaning of hardship and the relaxation of standards in appropriate cases.

The inadequacy of the present system is clarified when it is pointed out that the complex functions ascribed to the compliance hearing are already performed in housing code administration. Usually the existing method does not have the guiding hand of legal counsel and typically does not produce records that will sustain criminal court review. The compliance hearing process, from this vantage point, adds no new function but provides method to undertake already existing functions with greater competence.

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[2] *Harvard Law Review*, vol. 78 (1965), p. 818. Richard E. Carlton, Richard Landfield, James B. Loken.

[3] Ibid., p. 820.

The power of courts to make factual determinations about the existence of conditions that are dangerous to life, health, or safety is not at issue.[4] The problem, both of legislative enactments and of administrative process, is to provide for both competency and procedure through which administration can so well perform the fact-gathering and evaluation function that it can satisfy the court of its competence. It can be assumed that courts will give a presumption to processes in administration directed to factual collection and evaluation when the delegation of the function is clearly made through statute, especially when guidelines on method are provided. A competently made record, disclosing full consideration of data and opportunities for oppositional parties to present their case and counter one another in open forum, adds certainty to judicial acceptance of the administrative fact-determining process. Courts are usually willing to approve administrative processes that evidence high-level competence.

In 1967 the Illinois legislature enacted enabling legislation permitting Chicago to adopt what it described as a ''code hearing department.''[5] This could be adopted as part of an existing code-enforcing agency. With an important exception—noted below—this enactment comes close to the recommended compliance hearing system proposed in this study. It could well provide guidance to persons, especially lawyers, involved in improvement of enforcement processes. Like the proposal in this study, the basic concept involves the elimination of the widely current appeals board in favor of a hearing process integrated into the administrative operation.

An important element in any system dependent upon court imposition of penalties is that the court normally is dependent upon the testimony of witnesses. In housing code administration, when any substantial number of cases are taken to court, this may impose significant burdens. The burden falls primarily upon inspectors and is unavoidable unless some method is established, before the court hearing, through which the inspector's testimony and identification with his report of violation are reduced to record.

In explaining the utility of the proposed system provided in the Illinois legislation, a sponsor of the bill wrote:

> Officials at the Building Department in Chicago estimate that between 30% and 40% of the effective time of inspectors is now consumed in court appearances, most of which concerns waiting around in courtrooms for cases to be called. Adoption of the administrative fact finding device eliminates the necessity of court attendance by inspectors since the case will be heard on the record. Moreover, this gain is, in a sense, net in that the administrative hearing now provided is a substitution for a compliance board hearing now held in the Building Department but, until the enactment of the statute, such a hearing did not determine any issue.[6]

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[4] Discussing the residual authority of the court the following was said: ''Each case will depend on its own facts. Here at bar, albeit the eviction proceedings have been settled...there was some testimony by a tenant having a form of respiratory ailment and to whom air conditioning was a health factor. Again, the constant breakdown of elevators in high-rise multiple-story dwellings can obviously become both a health and safety factor. Rodents infesting such dwellings are both a health and safety factor. Inadequate heat, hot or cold water are health factors.'' *Himmel* v. *Chase Manhattan Bank,* 262 NYS 2d 515, 520 (1965). Such issues are within the reach of the court; they are more competently evaluated by experts who are selected and experienced in such matters. No intention is present to challenge judicial prerogative; competent administration relieves judges of functions that can better be performed by experts and brought to judicial attention through competent and complete records.

[5] Senate Bill No. 1261, enacted by the 75th Illinois General Assembly and approved by the Governor on July 25, 1967.

[6] Letter from Professor Julian H. Levi to Mr. Francis A. Jacocks, PHS, July 26, 1967.

The deficiency in the Illinois enabling legislation lies in its failure to consider the problem of hardship as an element in establishing intent or willfulness. There is no question but that the proposal will improve the record base in establishing violation, but the fact of violation is seldom the basic problem. The Illinois act, however, is drafted with care and considers the use of subpoenas and defaults, continuances, and the role of the hearing officer in something of a model. Greater clarity about the disposition of new evidence and the facing of the issue of the relationship of hardship to mens rea would make the bill a basis for the type of compliance hearing recommended in this study.

An important function of the compliance hearing is to contain and coordinate within the administrative system all methods of seeking compliance. At present some methods, such as use of receiverships or rent withholding, can be used as enforcement sanctions without integrating these into full examination within the expert competencies and fact-finding processes that constitute or should constitute the essential expertness of housing code administrative staff. The use and misuse of these corollary enforcement devices need further examination.

Search for Sanctions

Stubborn refusal to recognize and accommodate the economic factors underlying inadequate housing has produced a number of diversionary tactics that corrupt the basic traditions of our legal system, make the function of administration more difficult, and result in nothing beyond confusion. Four of these diversionary attempts are important, if for no other reason than that they demonstrate the reaching for something more effective than criminal penalties. In so doing, they open opportunities to incorporate the elements brought to the surface into housing code administration. The four approaches deserve brief consideration: equity courts and the use of injunctions and contempt power; receiverships as a device to compel reluctant landlords to meet code standards; rent withholding by tenants under some form of escrow arrangement; and finally, the legislative expansion of tort penalties through which tenants can bring pressure on landlords.

From the vantage point of increasing the effectiveness of housing regulation to improve low-rental housing and occupancy by owners who cannot pay for conveniences code writers consider in the public interest, the use of experimental approaches is never to be overlooked. The growing tendency of larger cities to turn to equitable sanctions is important. But the problem of obtaining and evaluating facts that must be measured by complex criteria is no more feasible in an equity court than in a law court. The principal accomplishment in seeking equitable consideration of cases is that the problem of intent changes its form. Since the traditional approach does not consider that the bringing of an action for equitable relief involves the proof, or demonstration of something akin to mens rea, the legal counsel acting in the interest of housing code enforcement does not enter the fray under as rigorous handicaps as he does when a case is brought into a court for enforcement of a penalty. Moreover, the court's discretion in the use of contempt as a sanction is great. This has distinct advantages over the rather silly characteristic in housing codes of branding every violation a misdemeanor and making penalties indiscriminately equal for all violations. The seeking of equitable relief is not a gimmick; it is a straightforward attempt to give effectiveness to the regulative process. Its weakness lies in the reality that equity courts are just as dependent as criminal courts on accumulating and evaluating facts that require expert understanding. The use of equity courts, however, probably has considerable potential if the fact-gathering and evaluation processes are more nearly completely organized and structured into record-making processes before cases are subject to equitable court consideration.[7]

Recent legislation in Michigan[8] places a degree of faith in housing betterment through reliance upon receiverships. The faith is great enough to cause the substitution of this emphasis for a relatively unworkable system of state-local utilization of housing code systems. The receivership approach will not accomplish much unless it is, or can be, used as a means of taking property without compensation. To do this, in turn, involves a premise that violations of codes constitute a nuisance-like condition. This conclusion is simply not supportable. It is true that some nuisance-like conditions exist and that failure to correct such conditions can warrant taking control away from an owner in lieu of his either correcting the violations or terminating its use.

Landlords, whether they rent to the poor or the rich, are businessmen. They invest money where it will make money. They protect their properties to the degree that it will result in maximum long-term returns. They sometimes face a future in which they can see eventual ruin and can be expected to try to do what is possible to minimize their losses. New capital investment in old buildings competes for investment in other enterprises. When code enforcement demands new capital, the building owner will consider whether such investment is likely to produce at least reasonable returns.

The characteristics of tenants is an important factor in determining potential investment in old housing for rental purposes. A neighborhood that is deteriorating and that shows little chance of being rehabilitated is not a place for making attractive investments. But if a neighborhood is stable and improvement in a building will attract higher rent-paying tenants the chances of finding mortgage or other money are much better. But there is a point at which, no matter what the condition of the building, no investment can be considered practical. When vacancies mount in declining areas the vacancy rate feeds upon itself. ''The degeneration of buildings, a substantial number of which have been virtually abandoned by their owners, creates a neighborhood environment that can only be fled from.''[9] The futility of a receivership would be obvious in such a situation.

The ''system'' is slowly learning that the free market cannot be expected to supply adequate, code-conforming, low-rental housing. There is still opportunity for ''limited dividend'' or public utility-type housing in which investment profits are recognized as very limited, and this is probably the type of housing that continues to be constructed without subsidy. In face of these conditions housing code administration is constricted to fumbling between recognizing hardship outside of legal guidance or undertaking to impose penalties through court action. The ''out'' of this dilemma through receivership must be premised upon an assumption that a court-appointed receivership can manage a project with greater efficiency than its owner has been able to do. Evidence available makes this assumption questionable at best.

Some questions cannot be overlooked in evaluating the province of receiverships in improving low-rental housing resources. What happens if the receiver, appointed by the court, does not manage to get the building on a paying basis? If he manages to borrow money and finds the rent returns do not cover interest and taxes, what happens next? Is it in the public interest that the project be taken over by the local government? Should it try to rent dwellings and accept the loss? Should it sell it at a discount price if it can find a buyer? If the receivership fails to develop a money-making building that pays taxes, then any future operation of the building must be subsidized one way or another. The missing link in the approach to receiverships relates to the failure to undertake the project with assurance that it will succeed. This should never be attempted without a careful market analysis and with full resources to make necessary expenditures. Much of the support of receiverships has been based upon the common misconception that the landlord willfully refuses to improve a building that is a sufficiently good investment to warrant bringing up to code standards. Unless the situation is extraordinary in that profit is not the guiding motivation, receiverships have little utility as tools to achieve significant improvement in low-rental housing supplies.

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[7] The use of equitable relief in housing code enforcement, and experience in use of mandatory injunctions, equitable consent decrees, and receiverships, are competently reviewed in an analysis in *Harvard Law Review*, vol. 78 (1965), 801-60, Richard E. Carlton, Richard Landfield, James B. Loker, and are not repeated in this study. Observations about receivership, however, have been extended because this is the most experimental direction and best lends itself to integration into the housing code administration system in its fact-gathering and evaluating capacity.

[8] Michigan, Public Acts 1968 (No. 286) effective Nov. 15, 1968. Section 5.2891(15). Section 5.2891(10) provides for suspension of rentals during periods of non-compliance. The reliance upon court process in 5.2891(14) would support making the housing code an adjunct of the public prosecutor's office. Little regard is had in this legislation for administrative ''expertness'' relating to housing. Where a tenant is specifically given authorization to recover damages, in addition to other relief (5.2891 (16)), and he is dependent upon a public or legal aid counsel, he could have both civil and criminal causes being paid separately by the taxpayer with the housing code administrator being made a witness.

[9] ''Bulldozer Renewal,'' George Sternlieb, *Journal of Housing*, vol. 25, No. 4 (April, 1968), p. 181.

Receiverships are potential tools. But the buildings must be carefully selected. They must be in neighborhoods in which returns to cover expenditures are probable. Buildings that are too decrepit may bring disaster to the undertaking. There is, of course, the problem of finding an acceptable receiver or administrator of the project. Some assurance is necessary that the undertaking will succeed. The bonding of the receiver adds overhead costs and makes the project's success that much more precarious. Then there is the problem of how the receiver can raise money for compliance work. Experience in Chicago with court-appointed receiverships[10] has found this to be a severely limiting factor. The receiver can be authorized, under Illinois law, to issue "certificates" to finance repairs, but reports indicate that there is no ready market for such questionable securities.

In New York City the administration under Jason Nathan does not lack authority to initiate actions leading toward receiverships. It is possible for the city to act as receiver. Costs can be a prior lien on future rents, but in the past "repairs often cost more than when done privately; limited funds tend to inhibit vigorous and extensive activity; and the city is open to attack if repairs are unsatisfactory or if tenants must be displaced."[11] It is too early to determine whether the reorganization of the administrative system in New York City will find a significant role for receiverships, but the limitations are well known to those in charge.[12]

There is one special type of situation in which the receivership may play an important role, but even then it should be under the careful advisory service of the experts in the housing code administration program, at least in the selection of building units that might be available. A number of projects might be cited, but that of the Chicago City Missionary Society, with a grant from the Federal Government, illustrates the character of the special situation. This approach is not that of the businessman. It is a project that combines motives, a hope to break even while accomplishing an important social mission. It is not argued that any substantial improvement in the massive problem of low-rental housing will be forthcoming by organized action with this motivation, although experiments may prove significant in attaining understanding of the economic problems inherent in such undertakings.

The conclusions reached by the authors of the *Harvard Law Review* article coincide with those reached in this study: After reviewing the complex economic considerations involved in the use of receiverships, "they also dictate a cautious use of the remedy, particularly when receivers are private persons who demand a reasonable return. Of course, authorizing large rent increases might allow repair of many buildings but would tend to displace many present occupants; appointing the city as receiver with the expectation of loss would achieve repairs but would constitute a disguised subsidy. These alternatives seem to subvert the remedy's basic designs; moreover, such widespread use of receiverships with prior liens might discourage mortgage lending and make less realistic any study of the economics of private rehabilitation. These arguments support the concensus encountered: that the significance of receivership as a practical code enforcement remedy lies in its potential ability to induce private repair.''[13] And it might be added, that this potential is not very great.

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[10] Illinois Annotated Statutes, ch. 24, sec. 11-31-2. Information about the program in Chicago was obtained through personal interviews with code administrators.

[11] *Harvard Law Review*, op. cit., vol. 78, p. 829.

[12] Interviews with Mr. Jason Nathan.

Rent withholding by tenants under authorization of state law is another experimental attempt to find a way toward better housing for the poor. Like receiverships, it is a means of limited utility. Like receiverships the tool is attempted without careful consideration of economic realities or effects, even when the device is undertaken through housing code administrative systems.

Pennsylvania's Rent-Withholding Statute differs from the Illinois (Rev. Stat. ch. 23, sec. 401.2) and New York (N.Y. Soc. Welfare Law, sec. 143-b(2), 143-b(6)) statutes in that it applies to all tenants, not just those on welfare. Pennsylvania Act 536 (January 1966) is applicable in Pittsburgh, Scranton, and Philadelphia, and of these only Pittsburgh has had over 2 years of experience in implementing it, Philadelphia only recently making extensive use of rent withholding in federally assisted code enforcement areas.

An article in a recent *Journal of Housing* describes how the system works in Pittsburgh.

A point-rating scale is used, and if inspection reveals that violations are below a certain point on the scale, the landlord is notified to repair, although the tenant is not eligible for rent withholding:

> The eligibility takes place when code violations score above a higher level. At that time, the tenant is notified of his option to enter rent withholding and instructed in detail on procedures to be followed if he wishes to participate. Concurrently, letters are sent to the landlord with a list of code violations and a time limit for compliance, while a copy of the letter goes to the district coordinator of the Office of Economic Opportunity for transmittal to neighborhood legal services. The law protects the tenant against landlord reprisals in the form of eviction and rent increases for the six-month escrow payment period. This point has been the focus of considerable dispute and legal assistance is sometimes required.[14]

This system is integrated into the departments responsible for code enforcement: the Bureau of Building Inspection and the Allegheny County Health Department. Inspectors distribute copies of brochures explaining the purpose and procedures of the rent-withholding program.

> Once an eligible tenant decides to use the rent withholding program, he must register and pick up an I.D. card issued by the Allegheny County Health Department. When the next rent payment is due, he pays his rent into an escrow account at any one of seven cooperating branches of Mellon Bank. If the repairs required have not been undertaken in six months, the escrow rents are returned to the tenant and he may enter another six-month escrow period immediately. Should the landlord abate the conditions within the six months, another field inspection is made in the presence of the tenant to attest the fact and the escrow funds are returned to the landlord. The tenant has the right to appeal the abatement decision to the Allegheny County Health Department.[15]

The administration of the program is extremely complex, since it involves judgments by the tenant, owner, field inspectors, and perhaps the housing court, legal counsel, and relocation agency.

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[13] *Harvard Law Review*, vol. 78, p. 830.

[14] Norman Krumholz, ''Rent Withholding as an Aid to Housing Code Enforcement,'' *Journal of Housing*, vol. 25 (May-June, 1968), p. 243.

[15] Ibid.

Evaluation of the program provides negative and positive results. In numbers of code violations abated, the program appears to have had less than hoped-for impact; 100 cases in escrow reported abatement, something less than 8 percent of those units eligible.[16] Increased staff, budget, and time for difficult cases have been required. But the assistant director of the Planning and Programming Division notes that the program ''represents an outstanding example of cooperation among the responsible city and county agencies and citizens' organizations''[17] and counts this as one of the more significant accomplishments.

However, unforeseen problems have arisen:

1. The problem of rent increases, not widely apparent yet, will probably accompany the increased investment required for compliance. As the author notes, the question of the improvement to housing quality at the expense of depriving the poor of housing they can afford is a serious one not yet resolved.
2. Relocation in a tight housing market has been a problem.
3. Withdrawal of housing units from the market has been accelerated; ''Some landlords faced with what they consider excessive government harassment, are evicting tenants and boarding up their units, exacerbating the problems of the relocation agency and the tensions already existing in slum neighborhoods.''[18]
4. There has been an upsurge in the number of properties offered for sale, and a cut in the asking prices. ''Owners simply appear to want ''out'' of the business in the face of increasing public pressure, unfavorable publicity, reduced potential for capital gains, and increased risk.'' As the author states: ''If they will not house the poor, if new private investors who might have been anxious to invest in slum properties are driven away as a result of government action, who else will provide this needed service?''[19]

Rent withholding is a coercive action against landlords. Collective action of like character is the ''rent strike.'' As Mandelker observed concerning these:

> The difficulties surrounding public enforcement of housing codes have prompted a variety of strategies in which the initiative for enforcement lies with the occupant. ... Another technique is the so-called rent strike, under which tenants withhold rent in order to coerce the owner into fixing the building. Rent strikes are on the firmest legal footing in New York State, where a statute gives tenants a defense against dispossession if the landlord has failed to correct defects constituting a constructive eviction after notice from the public agency (N.Y. Real Prop. Actions Law, sec. 755). The defense is denied if the violations are caused by the tenant. In states other than New York, in which there is no defense to an eviction, the rent strike has a weaker legal basis and the risks are greater.[20]

In a somewhat different category in the search to punish landlords is the perversion of the law of torts. Punitive tort damages are proposed to protect the dignity and right of the tenant. This approach would supersede the contract base of landlord-tenant relations, ignore the codes as vehicles for developing new patterns of reciprocal obligations, and assume that the relationship is essentially one of status. In his capacity as tenant the occupant is entitled to social amenities whether he pays for them or not, or whether his conduct warrants a conclusion that he deserves more than he pays for, or possibly less.

Use of negligence concepts are desirable in landlord-tenant relations that continue to deteriorate under the pressure of governmental policies. Tort, or negligence, values are based upon reciprocity. Codes are not. They are based upon obligation to the state. But the expansion of remedies independent from reciprocity of obligation not only confounds the concept of torts but also ignores the need for development of responsibilities that must be mutual to achieve results.

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[16] Ibid., p. 244.

[17] Ibid.

[18] Ibid., p. 245.

[19] Ibid.

[20] Daniel Mandelker, *Managing Our Urban Environment*, (New York: The Bobbs-Merrill Company, Inc., 1966), p. 683.

The *Michigan Law Review* has provided a forum for consideration of the problem. A quotation from the supporting article has previously been presented.[21]

The conclusions supporting the use of torts arrived at by Sax and Hiestand are seriously questioned in this study. However, a quotation from "Slumlordism as a Tort—a Dissenting View," by Blum and Dunham, is sufficiently in accord with findings to warrant its inclusion:

> Most slum buildings today are not brought up to standard because, taking account of neighborhood conditions, the necessary improvements will fail to bring sufficiently higher rentals to justify the added investment. The imposition of the suggested tort penalty would not alter this economic relationship.[22]

Justice and Coordination

Criminal penalties, forced receiverships, rent withholding, and penalties in the guise of tort rights are all comparable in effect. They adversely affect the landlord and offer little more than selection of sanctions. Except for the unilateral application of tort or negligence upon a status basis, there are situations in which each may have an advantage. But all should be clearly conditioned by the absence of undue hardship. The selection of sanction is probably best accorded those with recognized expertness in seeking improvement of housing conditions. In other words the election of sanctions should not be entirely a matter of private interest, and the selection to achieve a combination of justice and better housing is not identifiable with the courts, except to assure regularity and administrative competence.

From the sequential analysis in this study the conclusion is reached that the extraordinary sanctions available in use of receiverships and rent withholding should be considered as alternatives. And either of these best adapted to the public interest should be considered an alternative to criminal penalties. This means that the fulcrum upon which decision is made is best considered within the housing code administration where appropriate expertness, combined with understanding of legal principles, can be realized. The compliance hearing, with this perspective added has three functional purposes: (1) It reviews and evaluates the factual basis of pleas of hardship, the objective being to separate cases in which willful violation can be considered supportable from those in which it is not; (2) it reviews and records the development of individual cases that are considered properly subject to penalty and officially documents its findings; and (3) it considers whether the public interest and general improvement of housing will best be served through receivership, rent withholding, or enforcement of criminal penalties and provides critical record data to support its selection. Any one of the three functions is subject to judicial review, but when new or additional facts are sought to be there introduced, the case is subject to remanding with instructions. It is necessary, to accomplish these functions, that procedures comparable with those expected under developed systems dealing with complex economic issues be used. Staff competence must be provided. This necessity is beyond available resources but not beyond the expectancies of administrative results under present code administrative systems in larger jurisdictions.

A review of the range of basic legal problems inherent in housing regulation systems, of which the heartland is code administration, involves many of the most fundamental issues in our legal tradition. The question of establishing an effective line between prospective and retroactive provisions rises to the surface; it is inherent and gives trouble everywhere. What is the appropriate and fair separation of the use of police power in reducing values of property from eminent domain compensation on the theory that substandard property has a compensable value when taken for a public purpose? What is the relation between the gradually diminishing role of the law of contract, particularly as related to landlord-tenant relations and the scope of obligations created by housing codes and related legislations? How can the balance of ''hardship'' be defined and sustained against the denial and resultant liability for penalty? How can the law of negligence be applied to landlord-tenant reciprocal obligations? What is the line between the province of housing code control over the dwelling and zoning control over the surrounding environment? This problem is made more complicated because housing codes are generally considered retroactive under the police power while zoning restraints are prospective. What is the appropriate province of equitable jurisdiction, and especially of receiverships? This list is not academic. Perhaps it should include: Has low-rental housing become a public utility and honestly been treated as such?

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[21] "Slumlordism as a Tort," by Sax and Hiestand, is in 65 *Michigan Law Review* (see ch. 6, p. 14) (1967), 869–922.

[22] "Slumlordism as a Tort, a Dissenting View," by Walter V. Blum and Allison Dunham, is in *Michigan Law Review*, vol. 66 (1968), 451–468.

It is in the compliance hearing that the crossroads of policy and legal principle is found. It is properly within the framework of the housing code administration. It is the terminal phase and the transition to judicial coercion. The theory behind its jurisdiction is that its functions will be so competently performed that judicial approvals will be consistent. This will permit the housing administration to marshall its experts, provide orderly schedules for its inspectors, achieve a high degree of justice, and make life easier for courts. When this function is brought into the prominence proportionate to its importance, the absolutely essential need for intelligent subsidization of low-rental housing will be proved beyond all reasonable doubts.

Chapter 13

AREA PROBLEMS

There are two quite different area problems.[1] One relates to accommodation of housing standards that are relatively independent of where the dwelling unit happens to be. The other is concerned with the fact that most code administration systems are citywide. The problem of the ''neighborhood'' is of rising importance. This might be called the intracity complex. The problem of standards, independent of location, is not a suburban or rural problem. It is both of these and more because the same concepts of health and safety and the same technological competence exist independently of housing site. The problem could be considered one of national minimum standards if the American Government were monolithic. It is trileveled, however, and the basic power to regulate and coordinate controls is in the middle level of state government. To some extent it can be said that the National Government can influence but should not attempt to supersede this state function without disturbing balances that are ramified and delicate. A considerable degree of statewide uniformity can be considered functionally a duty of each state, but this must be qualified by both the ideology of local home rule and the facts of long-standing tradition. No state has attempted to impose statewide uniformity beyond the traditional level of abatement of nuisances or nuisance-like conditions.

Urban centers create housing problems different from those of rural areas once the minimum or nuisance level is passed. It does not follow, however, that all urban areas are alike in wealth or in attachment to housing conveniences and amenities. Nor does it follow that all parts of an incorporated area are alike. Some cities cover considerable areas that are not densely populated; other cities are relatively uniformly populated. Cities are likely to have suburban areas that vary from high to low density, and this distribution is not intimately related to corporate boundaries. In summary, it is obvious that local corporate boundaries are not very well articulated with housing problems or acceptability of notions of minimum standards. And some parts of both urban, suburban, and rural areas cannot afford the amenities considered necessities in other parts. Since the problem of democratic government is to consider local interests and permit and encourage the development of understanding of governmental processes through participation in significant area problems both in policy formulation and in the processes of execution, this perspective deserves careful attention in the programming of housing code enforcement systems.

A basic problem in housing code administration is that the units are not related to area problems and to democratic governmental processes as well as they might be. A growing problem is the fact that older cities have masses of relatively ill-adjusted immigrants clustered in the fringes of their business districts. Increasingly it becomes apparent that these clusters are acquiring permanent identity and will not readily be absorbed into the broader urban community. These masses are poor. They live in, and in the shadows of, public housing. They are, more than any other large population group, unable to bargain within a wide range of choices in housing. They live in housing that competes with public housing that is subsidized at the rate of some 30 to 35 percent. They form the hard core of the urban problem of housing regulation. It is the national, and to varying degrees, the local concern for these people that has made housing code administration one of the most complex problems in government.

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[1] Until well along in the development of the analysis of housing code administration the problem of areas of administration appeared as a subject of some importance, but one that could be subordinated to other headings. Certainly the problem has ramifications that extend over many aspects of administrative functioning. As the study progressed, however, it became increasingly apparent that the area problem deserved separate treatment.

The inner city problem is the most volatile politically; the suburban and exurban problem can wait in the sense that political upheaval does not threaten. It is in the inner city that the Federal Government has shown the greatest concern and in which the workable program has, and must, meet its destiny. It is as part of the workable program that housing code administration, at present, must meet its measure. To make this emphasis certain it must be stated and restated that the Urban Renewal approach to the inner city's problems is primarily through focusing resources and programs in special districts. It emphasizes the blind hope that neighborhoods can be vitalized or revitalized when rehabilitation has scattered previous clusters of maladjusted residents to the four winds but never far away.

The relationship between housing regulation, including code administration and environmental controls as a neighborhood tool, has not been, and is not now, understood. The possibility of using potentials to provide educational participation in elementary governmental processes that prepare for wider identification has been ignored. It is the intention of this analysis to consider the elements through which housing code administration can be made into a neighborhood dynamic, and that of the next chapter is to outline how this can be structured into an operating system. Disclaimer that the proposal is a panacea must be made at the outset, but claimancy is asserted that it is better than what we have and better as an experimental vehicle toward the future than more of what we now have.

HUD and Area Controls

The basic categorizing of areas into ''demolition,'' ''rehabilitation,'' and ''conservation'' was integral to the Community Renewal programs, although few of these managed to achieve their potential. One reason why potential was not reached centered in the failure to recognize that the classification of areas needed two ''tie-ins.'' One was with environmental factors that affected housing and left a gap between the individual dwelling and its surrounding conditions. This might be stated as failure to integrate classification to earlier land use zoning and failure to reexamine criteria through which integration could be achieved. The other was failure to establish differentials in functioning of governmental processes related to the different area categories. Specifically, the element of ''neighborhood'' was not spelled out with any significant meaning for such a category as ''rehabilitation area,'' and without this the potential of the workable program was impaired. But the most crucial deficiency was, and is, in the insistence that housing standards must be measured against a uniform value system. On its face this was, and is, absurd. It ignored the economics of property location and of differentials in expectations that reflect economic condition.

The basic explanation of the attempt to provide a single set of values for housing administration rests in two factors: (1) the code represents a minimum set of standards. The dilemma is that codes are never enforced successfully on this premise, and the courts will not, and do not, accept it in assessing penalties, with resultant breakdown in enforcement; and (2) that codes might be challenged under the equal protection clause of the 14th amendment.[2] This objection is repeated over and over in the literature and in discussion with enforcing officials, especially lawyers assigned to code matters—as though it were gospel.

Neither factor supportive of uniform code standards is well established. It is

[2] ''Municipal Housing Codes,'' a Note in *Harvard Law Review*, vol. 69 (1956), 1115, 1121-23.

unnecessary to belabor the fact that contemporary housing codes, practically without exception, far exceed what courts will, or should, consider minimum standards protective of health and safety. The second issue, the application of the equal protection clause, deserves more attention. The obvious comparison of housing codes with zoning ''codes'' or ordinances is enlightening. Generally both types of regulation emanate from legislatures, usually in local governments. Both exist under enabling legislation. Both are concerned with regulations developed from, and extended beyond, the nuisance concept. The purpose of zoning is to differentiate areas within a political jurisdiction and ensure uniformity of treatment within each ''zone.'' The purpose of housing codes is to improve housing conditions, especially in the areas inhabited predominantly by the poor. Both objectives are presumably in the public interest; both combine health and safety with economic, aesthetic, social, and political values. Both assume that expertness is responsible for formulation of standards and plays a part in administration.

So similar are the overt administrative comparisons that it is possible for a city to consider that the final administrative evaluation processes can be unified. Syracuse sought help from HUD about a desirable ordinance to establish a board appeals to meet HUD requirements. HUD made the following recommendation:

> A Board of Appeals is hereby established in accordance with the provisions of the local law to consist of the same personnel as appointed to the Zoning Board of Appeals. The Board of Appeals shall consist of five (5) members, each to serve for a term of three years. The terms of office of the members of the Board of Appeals and the manner of their appointment shall be in accordance with the provisions of the local law applicable thereto. ...[3]

This recommendation seems to assume that the appeals problem in zoning and housing code is qualitatively the same. This assumption is not in accordance with the findings of this stydy.[4]

An interesting comparison is obvious in considering HUD's basic theories of the relationship between zoning and housing code administration. The final processes in both can be unified because they are alike in the quality of questions at issue, and expertness or special competence in board members is so similar that an existing zoning board of review can have housing code review added with the assurance that this is HUD's value judgment. But remember *Guidelines* G-11; the housing code, ''to be adequate'' must ''be fully applicable, from the date of its adoption, to all housing in the community, regardless of when or under what code such housing was originally constructed.''[5] For emphasis it should be clearly stated that zoning regulations are prospective in application, and the principal difficulties relate to this problem. Housing codes are retroactive, and the principal difficulties relate to hardship.

Housing and Neighborhoods

If ''neighborhood'' is approached as a word in the English language, it will be found to have two quite different denotations. One is concerned with an area having determinable perimeters, the other, with mutuality of interest. Both denotations are important to the administration of housing regulations. It is all too easy to overlook the inherent conflict possible between the two meanings. Roget's *Thesaurus* puts the adjective ''neighborly'' in a category with ''friendly, amicable, well affected, unhostile, brotherly, fraternal, sisterly, sympathetic, harmonious, hearty, cordial, warm-hearted and devoted'' (p. 342). It is the concept of neighborhood indicated here that is necessary to determining zones or special areas. The problem of neighborhoods deserves attention; otherwise the case for zoned codes is without significance.

[3] Received in the Onondaga Neighborhood Legal Services, Inc., offices, August 26, 1968.

[4] See Chapter 10 ''Criteria and Sanctions.''

[5] HUD, *Guidelines* G-11, 11/66.

The welfare state has increased the affluence of the very poor and the poor and equalized their status. As it has accomplished this it has also precipitated conflict between the subsidized poor and the marginal worker. Together a seething mass has been created that confronts a fearful and alienated working-class society.

Within the clusters of the welfare poor are virulent hostilities. How can it be explained that this culture, teetering on the verge of violence, evidences such widespread apathy to community well-being? Two factors can be offered in explanation: (1) Equalitarian status is a result of the forced consolidation of a population that lives in the shadow of a welfare system that all too obviously thrives and (2) welfare, as administrative bureaucracy, consciously or unconsciously grows through establishing and maintaining dependencies of clients on case workers. It is loathe to lose the means of its well-being.

Next to death itself, welfare is the great leveler. Before welfare no segment in our society, particularly in the great urban centers, offered more variety or greater differentiation than the cluttered areas of the poor. Artists and thieves shared common absence of affluence. The temporary poor looked down on the long initiated. But the proud and the lawless were able to separate themselves. Landlords catered and tenants improvised in a competitive market that offered unparalleled varieties in ''substandardness.''

Welfare's success has proved catastrophic to these relatively stable and intermixed cultural patterns. From the perspective of seeking understanding of housing problems, a key seems to be that the entire group, splintered and reinforced by massive waves of immigrants who are out of place anywhere in modern society, have been given uniform bargaining power for housing. This housing is within a sharply compressed rental level; both its uniformity and its competitive quality are reinforced by the enforcement of housing codes.

Forced equalitarianism of the worthy, the socially responsible, the confused and unliked immigrant, the derelect, and the lawless has established substantial equality in bargaining for housing. With calloused good intentions it has forced an intermixing that submerges but cannot obliterate or even reduce its paralyzing and friction-stirring effects. The emergent physical neighborhood of the poor is united by rentables; it is in no way comparable with a definition that makes the key word ''friendly.''

No attempt is made to consider that the hard-core family—the unit that is unresponsive to the ordinary social and political pressures to curb its apathy or appease its destructive and anti-social tendencies—is a proper subject category for a ''zoned'' code area. But the contention is firmly asserted that effective housing for those clustered by rental payments cannot be structured into neighborhoods without consideration of the impact of such families. This does not mean that clear separation is possible or desirable; but social workers, as professionals, can point out families that will deteriorate and degrade others more than the others will help them. It is not presumed that this segregation to protect the majority from the minority can be made within the range of housing code administrative discretion. Nor is it recommended that the undertaking be made without concentration of service, health, mental health, counseling, and educational specialization to help the minority. But that it must be made is considered eminently desirable.

What is happening, however, is not concentration of the hard-core families where they can be given special attention. The forces at work will gradually result in concentration of such families in public housing. Housing code enforcement has results that cannot be considered within the range of expectations of its creators. When a private landlord brings his building into conformity it is only natural that he will undertake replacement of tenants with others he considers more desirable. The criteria of desirability are complex. Included are regularity in payment of rent, care afforded the building, demands for redecorating, and concern for the physical well-being of public areas and grounds. These elements are quite easily discernible, but they involve issues upon which common agreement is not always forthcoming. The more subtle elements relate to other tenant attitudes and neighborhood responses. Landlords, for reasons just as much related to profit as rent collection, are concerned with not losing tenants with desirable characteristics. When a tenant incurs negative reactions from other tenants it is a first recourse for relief to seek landlord cooperation in evicting the unwanted family.

The absence of a forum in which the protest can be heard leaves the hopeful tenant dependent upon the landlord. Will the landlord act? He is a businessman and should be considered such in seeking an answer to this question. Does he have a forum or court in which the cause can be considered? Can he turn to the housing code administrator to establish record responsibility upon which he can act and explain his action? If he evicts he must prepare for consequences that may be disastrous. Undesirable tenants face increasing blacklists, and this in turn stimulates sabotage and vandalism. If the landlord does not evict, the victory is to the undesirable tenant; the good tenant has no recourse but to move. He is also subject to sabotage, and the landlord has turned a cold shoulder. No agency offers protection. He moves away; another and less critical tenant takes his place. The landlord is headed toward disaster, and he usually knows it. Would any right-minded landlord spend money to improve the building?

A very rigorous competition for desirable tenants is developing in the system. Historically public housing came into existence with an attendant theory that it would keep people off relief. With the passing years it has become the least resistant to the hard-core family, and that situation threatens to continue and develop further. The landlord best able to protect his good tenants from bad tenants has an obvious advantage. Landlord organizations are widespread and increasing both in membership and in effectiveness in ''screening out'' or blacklisting undesirables. As these organizations increase in effectiveness a resultant concentration of hard-core families will knock on the doors of public housing administrators. Families that have previously been evicted reappear and with the assertion that they have been evicted. The public housing administrator is in a quandary. If the hard-core family is readmitted, especially when it is understood by the administrator, the hard-core family, and the residents of the public housing unit that the administrator has no effective capacity to exclude, the enterprise is in for trouble. After a succession of hard-core admissions, the more responsible families become desperate and seek accommodations elsewhere, even at the loss of space or conveniences. A downhill movement has been initiated that will soon become uncontrollable. The only hope is massive social services and counseling, and these are not within the province of housing administrators, unless through special resources beyond those obtained from rents.

A new, or relatively new, movement is taking shape under the heading, ''tenant rights.'' As can be expected the thrust is directed at public housing as the facility least able to resist when a movement blossoms with political enthusiasm. The State of Michigan, this year, considered a bill having the objective ''to permit the tenant a measure of flexibility in defending against a summary possession action.'' This bill is of general application,[6] but a companion bill starts out: ''Tenants in public housing are often expelled without cause, or for reasons that are arbitrary or capricious.'' The assertion is not documented. This year Rhode Island enacted a bill that ''protects tenants from being evicted as a reprisal for their having reported violations of health or safety codes in their dwellings or for having sought to make the landlords adhere to the provisions of their leases.''[7]

Such issues as raised in legislation designed to protect tenants should also protect landlords. Such questions almost invariably involve factual determinations of who is responsible for the violation in the first place. Questions of this character should be within the purview of agencies other than law courts. They lean in the direction of increasing the effectiveness of reciprocal responsibilities but do not fully achieve the potential. This study proposes that matters such as these be subjected to consideration in a local forum through which standards can be crystallized and local participation made functional.

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[6] The bill having general application is House Bill 3187; the other, 3184.

[7] Reported in State News, *Journal of Housing*, No. 5 (1968), p. 239.

The tenants' rights issue is more delicate than appears at first glance. Welfare has incorporated into its folds a substantial range of troublemakers of a type not uncommon in prepublic housing and housing code enforcement times. Many long-established public housing administrators consider that such characters are being ''forced'' into their projects. There simply is no support in contemporary public opinion upon which housing administrators can rely to keep people out, even though private housing is closed to them. When such tenants recognize that they are practically beyond eviction they become what might be described as professional troublemakers. If they belong to a disadvantaged group they are quite capable of raising a rumpus with immunity from both social and legal counteraction. Given these conditions it is reasonably safe to conclude that time will concentrate the hard-core families in public housing and that such families will have better facilities for their welfare allotments than those they have effectively dispossessed. They return to private housing without subsidy or with less subsidy under newer programs. The policy involved is bewildering at best.

No matter how confusing the ways of the government may be, the result of concentration of the hard core in public institutions will work out to the public advantage over general distribution of such families. Trouble lies in the fact that the effects cannot be the same in all cities. Some will have too much and some too little public housing space. It will probably be possible to maintain better control over old-age housing or other special categories. But the trend that is becoming clearly evidenced means that public housing has passed its best days. However, as the movement toward concentration of the hard core families becomes effective, the potential for neighborhoods with a degree of internal good will and capacity to move toward internal discipline and responsibility should brighten. This analysis does not reach deeply enough into the complex issues to define the criteria more particularly for neighborhood zones. It does, however, consider that the forces in motion warrant the consideration of greater institutional responsibility within neighborhoods. This responsibility is designed to include and permit majority interests in a neighborhood to cause the eviction of families found unacceptable for reasons that can be determined against objective standards in reconstructed housing codes or parallel regulations.

Control of Area Desolation

A most difficult aspect of housing code administration might be called a negative result. Just how much housing code enforcement contributes to this result is uncertain, but whether it contributes much or little, the results cannot be ignored. The results are not expected; they are unplanned ''zones of desolation.'' The problem is to find boundaries that can contain areas that have passed all hope of ''regulation.''

George Sternlieb has done much to bring this troublesome matter to the fore, and it is fitting to quote his recent observation: ''I would suggest, however, that a new pattern is evolving; this pattern involves whole areas of hard-core slums, which are becoming depopulated.''[8] Sternlieb's careful research has centered in New Jersey, which does not have rent control. In New York City the rent control factor makes determination of causative factors more difficult. The appearance of similar phenomena in other places adds assurance that the rent control factor is not the basic cause.

There is no question but that desolation areas are appearing in a number of cities other than New York City and Newark. They cannot easily be explained as failure of older residents to be superseded by new immigrant groups. The immigrant movement continues, but it is just more of the same that has been dominant since the Second World War. There is scanty evidence that the older immigrants are moving up and into higher rental properties at the rate earlier immigrants moved. A more probative explanation is worth seeking in the rise of friction within the older groups and the accumulation of tenants that are incompatible with rent-paying capacities, when taken into account with habits and unacceptability by older residents. The increase in vandalism, especially organized and uncontrolled, is not easily ignored.

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[8] George Sternlieb, ''Bulldozer Renewal,'' *Journal of Housing* (April 1968) vol. 25, p. 181.

At least large numbers of building that could have been made tenable with relatively small subsidies and better environmental controls have been lost to the tax base of cities, and larger numbers threaten to go the same way. Failure to provide either separation of hard-core families or effective services to increase their attractiveness as tenants has played an important, but as yet, undetermined part. Market mechanisms do not break down for no reason at all; it is surprising that resistance to this most troublesome and unexpected situation seems to have curbed research into causation.

The causative factors resulting in extensive area abandonments must be better understood before housing code enforcement can be fully equated. The attempt to force substantial investments, by landlords, into areas that are beyond salvaging will not only meet resistance but will also force earlier abandonment as landlords are forced to make choices. It is one thing for a city, through Urban Renewal, to plan systematic demolition and integrate this with rehabilitation programs. Into this type arrangement, with its relative predictability of life expectancies, it seems possible to consider selective enforcement or provisions appropriate for the usable life of the building. But until the relationship between landlord economics and code enforcement burdens are subject to better understanding, a planned interrelationship is practically impossible.

The contemporary critical problem is to find ways of containing abandonment within determinable limits. The margins of such areas are corrosive; they seem malignant and insatiable. ''Natural forces'' seem unavailable to stop their spread. A remedy unlike any of the standard approaches of Urban Renewal may be indicated to create barriers in the way that forest fires can be checked.

Certainly housing code enforcement has no place in areas that are doomed and where enforcement would only hasten catastrophe, at least until the effects are more clearly known. Pompous pronouncements such as Guidelines G-11 are out of place and appear ridiculous as policy proposals if taken literally.[9]

Administrators in large and not so large cities freely express concern that housing codes may be reducing rather than increasing housing for the poor. The fear centers around boarding up, uncontrolled vandalism, and out-and-out abandonments. More concern with effects upon tax base are heard in cities than seem recognized in Washington in these matters. Sternlieb's notation that other cities are evidencing ''unmistakable symptoms of these phenomena''[10] are quite consistent with what has been discovered in this study.

Zoned Codes

The case for zoned codes rests in the belief that consideration of the public interest is better advanced through recognition of the basic facts surrounding housing than by repudiation of these facts in favor of theories that appear, at least, to be politically acceptable. In a system given to the encouragement of productivity and managerial competence, free choice in spending emoluments is critical. The choice of place to live has been, and is, an important freedom. This freedom obviously is, and should be, greatest at the top rungs of the economic ladder as a reward and progressively restricted as the lowest rungs are reached.

[9] Guideline-11 is quoted on page 103.

[10] Sternlieb, George, op.cit., p. 181. Sternlieb is working on a study on the problems relating to landlord ownership, and particularly as to the dynamics behind abandonment, with Jason Nathan in New York City. This study is considered of basic importance to the future, not only to New York City, but also to the country at large and especially to provide help to HUD.

Minimum housing regulations should protect everybody. At the bottom rung, people should be protected against dangers to health and safety. This protection should be considered a matter of right, independently of status or economic position. Protection above this minimum is rightly dependent upon concensus measured through the political processes. Local governments should be expected to provide minimum protections and should have the freedom to add to these standards insofar as local electorates consider valid. The distribution of the local tax dollar should be within the province of the electorate representing the taxpayers. If a larger political unit wishes to impose additional standards over a local unit included in the larger one, it should be free to do so in accordance with the policies expressed in its legislative processes. But it should pay the additional costs. The allocation of funds and emphasis in enforcement within a local political unit should be within the determination of that unit, provided minimum standards of health and safety are respected. This means that within a political unit of local governments all properties, or all areas, need not be treated uniformly. This principle of disuniformity based upon considered political policies is the keystone to zoning administration. In this study it is argued that housing codes, above the level of basic health and safety, are essentially subject to the same treatment as zoning codes and that the public interest would be increased by development toward unification of both zoning and housing codes and by filling the gap that now exists between the two.

Discernment of the need for zoned code enforcement is not new. The following statement assures that others have come to similar conclusions:

> Code enforcement can probably prevent deterioration most effectively by enforcing higher standards of maintenance and repair in good neighborhoods than can practically be required in slums. Maintaining the physical condition of a good area will encourage investment and keep financing available. Consequently, achieving a reasonable degree of uniformity in each cohesive neighborhood may be important. A policy of area enforcement might be formalized through ''zoned housing codes'' prescribing different standards for different neighborhoods. ... Requiring different physical standards in slums and in silk-stocking districts may be politically imprudent. To the extent that inspectors tend to interpret these general terms more strictly in better areas, the advantages of zoned codes are achieved informally.[11]

Since this analysis focuses upon administrative problems it is of the utmost importance to give attention to the final statement in the above quotation, that is, ''that inspectors tend to interpret these (performance type) general terms more strictly in better areas...'' Practices of this type undermine the integrity of administration, subvert public opinion, and bring housing codes into disrepute. From evidence obtained in this study, however, the practice of differential enforcement might be said to be ''normal'' even though technically illegal. If areas must be treated differently, it should be done aboveboard and not clandestinely. Corruption as an institutionalized element in an administrative system is too dangerous an element to be fostered when it is not necessary. Perhaps the low esteem in which the general public, in many cities, holds housing codes, is a result of the assumption that is prevalent: that the Constitution condones it as long as forms are kept circumspect.

The case for zoned codes does not argue the simple application of the present housing codes, or the APHA code, as minimum. It is more nearly maximum, and this is one of the principal reasons why this code, and others similar to it, find it so difficult to obtain judicial blessings. The codes are excessive when viewed as minimum and inadequate when viewed in terms of adequate foundations for environmental control of housing. Some years ago the present author considered that a Community Renewal program could produce a bridge connecting a system of zoning and housing code administration.[12] This proved beyond resources, but the idea of the bridge still seems sound. Discussions with administrators, especially those who view the relationships between regulative programs with concern, clearly evidence considerable dissatisfaction. Housing is more than a dwelling unit that is safe and convenient and in a zone that is not commercial or industrial. Housing codes should be considered a first step toward more effective planning and conservation of elements that make living pleasant and give spiritual lift to urban or other environments.

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[11] Note, *Harvard Law Review*, vol. 78, pp. 812–813.

Simple reiteration that the Supreme Court has upheld, without qualification, the use of districts or zones for urban renewal when related to objectives consistent and almost identical with housing code purposes is important. So are the facts that the landmark case of *Euclid* v. *Ambler Realty Company* was decided 42 years ago and that zoning under the police power, even when the objectives are heavily rated toward economic protection of land and community values, lends solid comparability with housing codes that do much the same thing when considered as being beyond minimum health and safety standards. So obvious is the logic that a coordinated system of environmental controls, separated from the basic health and safety provisions, would be constitutional, that further consideration of the matter seems unimportant.[13]

A NOTE ON ZONED ENFORCEMENT BOARDS

Although not supported as the most effective approach to enforcement of housing codes in special areas or zones, a suggested system has been given some prominence in a recent publication of *Law and Contemporary Problems*.[14] A short note on this proposal is considered important, although the proposal in this study is that housing codes can be varied in substantive provisions among different zones but enforced through a single inspectional, counseling, and compliance hearing system. District or zone areas should be given substantively different consideration in terms of their characteristics, but the standards of evidence and the record-making processes should be as uniform as possible throughout the jurisdictional unit in the theory of the compliance hearing system proposed.

The article proposes that housing code violators come before neighborhood boards. These boards would be authorized to determine and fix timetables for repair after they had offered advice and found that a violation exists. The basic element in the proposal seems to be the encouragement of neighborhood involvement. It also presumes an expensive congregation of experts; more in fact than most cities of middle size now afford. Each board is to have its own engineers, planners, and attorneys. The inspectional processes are placed under the board's jurisdiction, and neighborhood participation in reporting violations is to be encouraged. The boards are also to conduct schools for ''underurbanized tenants and fledgling landlords.''[15] The schools are to be similar to traffic schools. The extent of local rule making is unclear; the enforcement proposed is limited to penalties and in general seems subordinate to the main office of the local administrative system. Board rule making is ''subject to over-all policies and guidelines laid down by the central administration.''[16]

More detailed study would be necessary to determine the definitions of ''zones'' for differentiated code standards. Some general principles clarify the need for these and seek to meet criticism that equal protection of the laws is a stumbling block. In the first place it is essential that a minimum standard code be developed as the foundation. All areas within a jurisdiction would be uniformly affected under this code. This code would be based upon the nuisance doctrine and upon whatever scientific knowledge extends to this doctrine so that it can be substantiated as related to health and safety. Such a code is recommended to be enacted by state legislative bodies and to have statewide coverage. There should be a rule-making power in the state health department or in some composite agency in which health department expertness is incorporated to supplement this code with additional provisions that are based upon scientific knowledge or agreement of experts as being intimately associated with health and sanitation safety.

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[12] The study produced two separate reports. One had to do with the physical planning problems and the other with the social planning. The second volume proved of significance when Providence undertook a Model City demonstration project, according to Charles E. Wood, the administrative assistant for Planning and Urban Development.

[13] See Daniel Mandelker, *Managing our Urban Environment*, especially chapter 5, ''Legal Intervention to Manage the Environment.'' The *Euclid* decision is discussed in the context of its history and in relation to the larger questions involved.

[14] Richard Babcock and Fred Bosselman, ''Citizen Participation: A Suburban Suggestion for the Central City,'' *Law and Contemporary Problems*, vol. 32, (Spring 1967), 220-231.

[15] Ibid., p. 223.

[16] Ibid.

It is in determining requirements above this realistic minimum code that the zoned area category has meaning. Certainly, the better residential areas can be made to coincide with the conservation areas of community renewal programs with little accommodation and kept up to date as integrated enterprises. These areas would have code provisions, uniformly enforced over their metes and bounds, that are keyed to protection of economic values and social value consensus. No claim would be made that these elements are any more related to scientific knowledge than is made for the provisions of zoning categories. Both keep neighborhoods or described areas from deterioration or uses that will decrease the common values. There is no good reason why the provisions of such a combined regulative system should not be reinforced by other provisions that represent a more nearly complete appreciation of environmental factors. Such integration of housing codes designed for protection of both health and economic values with zoning regulations is recommended. It is also recommended that this composite be extended to environmental factors that contribute to better livability in the area.

An area that is marked, as is the Model City demonstration, for substantial improvement and that can be subsidized in cases of hardship calls for a code that is appropriate to the durability of the area. Too little consideration is given to the time in which investment recoupment is possible or probable. A rehabilitation concept having a projected year's duration for housing should condition the requirements above the base or minimum code. Such a code, as in conservation areas, should be expanded or supplemented to cover at least as many environmental factors as possible under the demonstration undertaking. But the equal protection issue seems almost immaterial; the area is marked out for special improvements related to its expected life use. The environmental and dwelling controls are to be enforced to accomplish this objective. They are to be designed to accommodate this end by competent experts. There is no essential difference between environmental controls that apply to different elements in the plan if they are well conceived and related to the public interest. The public interest is best served through the integrated plan, and there is every expectation that courts will so view the problem.

An element that deserves consideration in seeking more nearly comprehensive approach to environmental planning is the relationship among the Urban Renewal categories of ''demolition,'' ''rehabilitation,'' and ''conservation.'' None of these words clearly express a category that can be used in administrative program development. For example the term ''demolition'' expresses the action to be taken but gives little help in determining when the action is to take place. The administration of housing codes should have firmer time schedules to plan its schedules. Certainly there is a difference between the policies and expectancies of private expenditures for construction costs above minimum safety and health requirements if the demolition is to take place within a few months rather than not for 10 years. Some cities may have plans that both stagger their programs and coordinate the expectancies of housing code administration; none of these was discovered although the method of inquiry was far from perfect. If the common sense inherent in the ''zoned code'' idea takes hold this relationship deserves primarv attention.

Similar observations can be made about the relationship between housing code administration and rehabilitation programs. The time expectancy of a particular project area in which rehabilitation is undertaken differs from that of other areas. There should be opportunities for interrelated categories. An area might well be rehabilitated to provide a few years, five for instance, with demolition projected at the end of the period. It would be necessary to protect health and safety in a somewhat different frame of reference than in areas considered ''permanently conservable.''

From the vantage of determining expenditures, above the level of nuisance-like or basic code requirements, not only the neighborhood characteristics and their expected yielding to change but also the life expectancy of the building should be taken into account. Some regard, in addition, should be given the character of a dwelling's use. An old spinster who has lived 30 years with cooking facilities and who is now skimping along on a pension should not be required to give up her way of life and turn to welfare in order to have the convenience of a kitchen. There are few carefully drawn provisions in housing codes to protect this type of hardship, and those that exist are dealt with harshly by HUD.

Land use zoning and Urban Renewal's classification of demolition, rehabilitation, and conservation seem too unnecessarily independent from one another and uncoordinated with housing code requirements to recognize the fact that somebody has to pay for improvements and that governments can be expected to develop plans that give some expectancy of land use in particular areas. Simply stated, although HUD insists on planning as desirable for states and local governments, a bit of planning for programs it supervises wouldn't do any harm.

In Dade County, Florida, a most significant experiment in code enforcement is taking place. Here a single administrative organization is undertaking to enforce differentiated codes in different areas.[17] The codes have been designed with special attention to area problems; the code for Miami is more restrictive than for suburban areas. This use of police power, recognizing area needs, and undertaking to accommodate them through the bringing together of a number and range of experts not possible in segmented area administration, is considered the wave of the future. Every effort should be made to increase code administration areas and recognize that the larger units can afford the quality and range of competence that is essential to competent administration. Most local jurisdictions are woefully inadequate to bring experts to bear in proportion to the problems that must be faced. The result is that we are building a code administration system that must be slowly rebuilt upon more efficient and competent models. What can be done to avoid this costly and confusing process should be done.

Insight into the relationship between housing or dwelling units and complex environmental factors must be increased as minimum standard codes are imposed over wider and nonurban areas. The factors that are critical to successful homemaking in terms of different population densities and the values to be accorded environmental elements must be more fully known. This knowledge must, and will, produce new concepts in zoning, zoning that is integrated to consider economic and health factors as basic roots but that can be modified to permit experimentation and local adaptation. Many more things are to be learned about effective housing integrated into total environment than can now be only surmised. Government, faced with unprecedented redistribution of populations and technological resources, cannot live on its great traditions. The government of the future will thrive because it recognizes and builds new institutions in the direction of its unrealized greatness.

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[17] See chapter 10, p. 92.

Chapter 14

NEIGHBORHOOD EQUITY COURTS: A PROPOSAL

Codes: Premises, Scope, and Sanctions

The providing of housing, since the breakdown of the feudal system, has been based upon ownership by occupiers or upon landlord-tenant relations. These relations have been considered essentially as established and maintained through contracts. There has grown up a complex body of law, sufficiently distinct to warrant law school courses, in the relationships of landlords and tenants. This system has assumed that the essential standard setting is built around the mutual obligations established between contracting parties, reinforced by the obligations owed under the law of negligence. In effect the rental of housing is a business conducted for profit. Governments began imposing conditions into this complex around the turn of the century through tenement house laws. Over the years these imposed conditions have expanded and are now represented by competitive ''public'' housing, subsidized housing, and especially by housing codes and their administration.

Housing codes fundamentally change the pattern of landlord-tenant relations. They supersede the legal norm that standards are set through contracts and that the public interest results from competitive bargaining among the parties. There has been, however, no careful examination of the results of this partial supersession. Probably the most important element in the change has been the reduction of the effective mutual responsibilities between and among the parties. Housing codes have attempted to replace this pattern through increasing the responsibilities and duties of owners, landlords, and tenants and making these responsibilities directly to the state. The system has developed only to the point in which the old patterns have been disrupted. In reaching for new patterns it has been assumed that relationships can be established and maintained through reliance upon penalties. This both reduces the mutual responsibility pattern and creates an unworkable situation. It is the basic premises that need reexamination, not the perfecting of the present mechanisms.

Established systems, generally, do not respond to or even recognize the elemental economics of the environments in which they function. Tenants with low incomes have little elasticity in their budgets. They have ''allotments,'' if on welfare, for rent payments, and if rent costs exceed these allotments, funds must be extracted from what is designed as minimum living standard resources. Tenant violations, under such circumstances, seem peculiarly ineptly approached through assessment of fines. Nor is it a criticism of courts if the system staggers and droops. Owner-occupants, especially those in retirement or handicapped, or on fixed pensions, are hardly considered subject to fines if they cannot meet increased code requirements. The proof of willfullness and presence of violation is not enough.

Housing code enforcement is directed against landlords, sometimes to the practical exclusion of both tenants and owner-occupants. The assumption has been made that the landlord can either absorb costs imposed by codes, an assumption that presumes that his previous profits were excessive, or can raise rents to cover at least new capital investments. If he cannot

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raise rents because of neighborhood conditions limiting appeal to higher income tenants, he is faced with a choice of compliance and operating at less than a reasonable profit or boarding up the building and abandoning it. The question is not whether the landlord is rich or poor or whether his past profits have been excessive through allowance of building deterioration. This very condition may be a consequence of the impact of code enforcement itself. The basic question is: Can the landlord comply with the code and supply adequate services under conditions in which rent-paying capacities, in the market situation, are inelastic and still have an opportunity, through reasonably efficient administration, to make a reasonable profit? If this question is ignored, and it usually is, landlords are subject to punishment because tenants are too poor to pay ''reasonable'' rents in a building located where a tenancy with higher rent-paying abilities cannot be attracted. Results of code enforcement under these conditions can be, and increasingly are, disastrous.

If housing codes were vehicles through which scientifically determined and demonstrated standards relating to health and safety were imposed, they might conceivably support what amounts to a summary-oriented enforcement system. If codes were extended in coverage as a consequence of new knowledge so as to provide increased protection, their escalation might be warranted. Neither of these conditions exists.

Housing codes, as they now exist and as they are being escalated in coverage, are primarily a reflection of a politically achieved program of conveniences and amenities. Their base of legitimacy is political concensus. They serve the interests of a society conditioned by a rising and inequitably distributed affluence. They are projection of middle-class values over a wider spectrum of society. Only when these conditions can be recognized, admitted into development of rational support, and incorporated into administrative processes can housing code administration become a critically important means of combining elements of a higher attainment of social and individual justice.

Codes: Responsibility Patterns

Housing codes are imposed over the law of landlord and tenant. This law has a long history and is complicated. Inherent in its premises is the acceptance that both the landlord and tenant are free men and that the arrangements they make are essentially contractual. The housing code, however, is not intended to be a patterned modification conditioning the contract relation. It is a substitution of government-made conditions that limit the scope and operation of contracting. Increasingly both landlord and tenant find the boundaries and conditions of their duties and responsibilities through examination of the codes, administrators' regulations, and interpretations evidenced through enforcement processes. How this change has modified the quality of justice evidenced between the parties has been little examined, although legislation as part of code requirements, or parallel to them, conditions the tenants obligations and even the landlord's rights to evict. Although this study does not reach far enough to attempt definitive conclusions, it seems somewhat apparent that the coordination of administrative and judicial processes is gradually deteriorating and that reconsideration is in order.

Separation of the responsibilities owed the state, or its agency, from those owed by tenants to landlords, by landlords to tenants, by tenants to each other, and possibly by both tenants and landlords to neighbors and from reciprocal responsibilities is growing. It is not, however, growing with the conscious and systematic considerations that are essential. The codes need overhauling to particularize with greater explicitness the behaviors of the parties concerned. These behaviors are not appropriately considered duties or obligations owed to the sovereign or his agents. They are obligations owed to one another. In a sense they are to be considered adaptations of the concepts of tortious conduct that supplement the definitions that are superseding, or have superceded, contract relations. They should not be considered of such quality that the established courts can efficiently deal with them. More intimate knowledge of the situations in which they occur and their relation to code expectancies support the need for some tribunal in which both the reciprocal responsibilities can be examined and the relationship of these responsibilities keyed to the meaning of code provisions. The impact of experience in interpretation should be on administrative rule making rather than on legislative enactment. The cases are framed in local situational conditions and must reflect the current emphasis upon differentials in code enforcement in different ''areas'' or ''zones.'' These differentials are fundamental to the contemporary approach to urban development programs.

If the analytical determination that there is inadequate separation between the responsibilities owed to the state from those owed within the neighborhood to one another is valid, then a division can be made in administrative patterns that may give greater possibility of success. Parallel systems are proposed, one system centering around the consideration of responsibilities leading toward penalty for willful violation, another system providing jurisdiction toward clarification of issues and responsibilities, and dispute settlement among the discordant parties within the neighborhood complex. To effect this separation, two administrative hearing systems are proposed. One is concerned with making a record and clarifying the economic status of disputes, which leads to orders in which noncompliance continues the use of the criminal penalty. The other is concerned with the interresponsibilities within the neighborhood, or total jurisdiction, of parties involved. This process can be, but need not be, within the housing code administrator's jurisdiction. The best argument that it should be within, is that the construction of mutual responsibilities and interresponsibilities centers around both code construction and negligence liability. The best argument that it should be outside is that there are other agencies, such as family courts, in which the special function might be lodged and in which expertness in situational problems could be acquired. The important thing in this contention is the separation of types of cases in terms of kinds of responsibilities.

Recriminations abound in housing code administration in regard to relative responsibilities of parties. These antagonisms seem as much fostered as alleviated through present workways. There is no sense at all, if justice is to be an ingredient, in requiring a landlord to put in a succession of windows for tenants who recurrently break them. The situation seems almost beyond belief when the welfare allotments for rent can be withheld if the landlord refuses to fix windows under such conditions and when restrictions are placed on his capacity to evict legally. Such conditions are not uncommon. Code administrators at present simply sit on the sidelines or connive to try and exacerbate rising tempers and retaliatory actions. There is no way a landlord can protect ''good'' tenants against ''bad'' tenants who engage in undesirable practices; there is no effective way one low-income tenant can protect himself and his family against another. The conditions associated with words such as ''slum'' and ''ghetto'' are encouraged by a system in which the control mechanisms are so immature and underdeveloped.

A lesson can, hopefully, be learned from the New Orleans experience[1] in dealing with landlord-tenant relations. Neither party can be heard to protest unless he comes with clean hands. Sanctions to such mixed issues as can be expected to arise where code provisions clash with negligent behavior cannot always be sorted out and will depend somewhat upon the success of neighborhood organization. Beyond this it will depend upon the cooperative relations with public welfare and counseling agencies. Beyond this must be an appeal to the courts. But when a case comes to court it will not have the ragged edges that characterize so many that now get onto the docket. It will have a record of past actions, persuasions, open hearings, and record evidence that will at least make the functions of prosecutor and judge more likely to support administrative policy and decision.

[1] See Chapter 10 ''Counselling and Conference'' for a discussion of the New Orleans ''Irish Channel'' approach.

The conditions to justice, like the freedom presumed in landlord-tenant contracting, are both denied in low-rental-area environments. Both assume enough resources of parties to divert funds, or future commitments, to start the machinery of justice and keep it activated. No system of providing legal counsel, alone, will meet the issues involved. Moreover it seems impracticable to provide counsel to both sides of a row between tenants and tenants or between landlords and tenants when neither party has experience or resources. It is one thing to provide counsel to the ''poor'' if the opposite party or adversary is the public prosecutor. It is even possible to provide counsel against landlords who are ''slumlords,'' that is, profiteers making excessive gains at low-income tenants' expense and ignoring code violations. But experience shows that there are limits to the numbers of these monsters, and it is not long in most jurisdictions until the noncomplying landlords include mostly people who cannot easily meet costs. The two categories must at least be recognized and treated differently if low-income or low-rental housing is to be provided, especially when substantial public housing is in competition marketwise or sufficiently competitive to affect rental values substantially.

A neighborhood equity court can represent one building with a number of apartments; it could represent a jurisdictional area of a model city project; it could represent anything in between where the conditions to organizational action exist. It can be a small city or the Urban Renewal area in that city. It is only the principle with which we are concerned at present, a recognition that some unit is needed that is able to hear complaints and preferably able to add standards relating to amenities and conveniences and other environmental standards.

Widespread participation in determining application of penalties was historically an antecedent to representative assemblies. It was from this experience that juries became inculcated into our governmental processes. Jury service has been, and is, an educational experience in responsible ''rule of law''.

It is presumed that the pedestrian poor, both immigrants and welfare clients, have been, and are, denied effective experience as jurors. The most difficult element in responsible conduct centers around the concepts of family law, contracts and negligence. While it may prove possible to localize policing for some purposes, the projection of jury service participation in basic civil law responsibilities seems most practical and can easily be focused upon the standards of landlords, tenants and owner-occupants in matters relating to housing.

Too little attention has been given to the development of institutional patterns through which the elements of citizen responsibility are learned through participation. The thrust for neighborhood responsibility should be met with experimental programs. Too often, the meaning of participation is limited to representation on committees or to policy discussions. The utilization of participation in standard setting and enforcement through local bodies has not been given much attention. Perhaps recognition for local supplementation of rules could be limited to a solid common foundation of hard-core principles in negligence as applicable through code provisions, but some element of differential should be considered to recognize the disuniformity aspect of present-day code enforcement.

One important lesson can be borrowed from the law of equity: no local housing court, with its representative jury selected by lot, should entertain complaints except when the complainant comes with ''clean hands''. Such an approach would limit the landlord-tenant recriminations which nearly overwhelm code administration in some places. Generally the Neighborhood Court would serve best in an area predominantly comprised of renters. This consideration of areas involves problems in definition of jurisdiction. The Urban Renewal workable programs, given special emphasis through the neighborhood-oriented provisions of the 1968 housing legislation and reinforced through conditions that must be faced in the model city program, suggest that the idea of neighborhood responsiveness to implementation of standards is foreign to contemporary thinking. They also suggest that the area or neighborhood definition problem is not as difficult as might otherwise be expected. Stated another way: Housing code administration can become a significant tool in establishing both a quasi-legislative and quasi-judicial element in neighborhood program development.

To accommodate the separation of processes: the compliance hearing leading toward the penalty-imposing mechanisms, and the administrative hearings leading toward clarification of civil remedies with possibly a dose of the meaning of ''equity'' in the days of its early development, will require an overhauling of housing codes as well as a reconstruction of their administrative processes. The elimination of what have been considered as diversionary tactics distributing responsibilities over many agencies and processes to achieve effective housing escalation should be an important element. The processes that result should concentrate the regulative enterprise in the responsible discretionary function of housing regulation in coordinated agencies in local administration. It should eliminate direct court action within the province of jurisdiction extended to the administrative concentration. This idea is not far from saying that the combination of functional processes now brought together in New York City, or to a somewhat less extent, in Dade County, Florida, should be experimentally extended generally. This in turn will require reconsideration of the size of jurisdiction and quality of expertness in administrative units. This means that many of the existing code-administering units are both too small and beyond resources to achieve competence.

It is appropriate to note that the ''area'' problems, both within and without corporate areas, is primarily within the control—the word is used advisedly—of HUD. It is equally true that the concentration of expertness involved in educational buildup, counseling, and persuasion functions lies in the distributed—the word is used advisedly—competence of HEW. No more critical problem exists than to bring these agencies into recognition of their provinces and of their common areas of potential. However, the responsibility for the development of trained personnel and the criteria for such training may well be divided; HEW is best prepared to expand the environmental and human adjustment understandings needed for the neighborhood equity staff, while the hearing system leading toward penalty seems best integrated into building code, planning, and land control systems that can be coordinated and developed through HUD.

No constitutional question seems involved in the creating of an administrative agency with quasi-judicial powers and with capacity to make valid determinations, subject to judicial review. The Tort Liability Act of 1946 is precedent for the delegating to administrative agencies of jurisdiction over negligence determinations, and no further major body of legal doctrine is involved beyond the housing code provisions that have been considered valid under the vagaries of police power.

It will be considered more appropriate and easier to establish an administrative tribunal with a law school-trained hearing officer. Whether or not he is a member of a local or state bar seems less important than his relative familiarity with housing code administrative situations. Certainly he should have competence and discretion to see that rules of procedure and practice are sufficiently explicit to ensure an assumption of legal validity to the proceedings. There is no good reason why such a hearing officer should be exclusively concerned with code-tort cases related to housing. Nor is there likelihood that enough business would develop to provide full-time occupational activity, except in the largest jurisdictions.

The hearing officer should preside. He should also be considered something of a teacher to explain the principles, or justification for process or procedures. This function would be augmented in cases involving the use of juries. There seems to be no reason why the presiding officer in neighborhood hearings could not also serve as hearing officer in the administrative housing code hearings. Experimental operation of this system should help determine the category of cases best considered in each decision making process. The categories, however, must be established by state or local legislation. The jurisdiction of neighborhood courts might well extend over wider regulatory subject-matter than housing codes. Administrative hearings should be considered administrative, and subject to regular court review. Administrative hearings not only save regular court time but also permit development of the social and technical understandings that enable hearings to make records subject to citizen understanding and provide appellate courts with materials facilitating minimum court process to attain effective justice.

It is considered important, however, that the hearing function be separated functionally from the preparation of hearing materials, guidance of inspectors, and even the rule-making processes. Moreover, and particularly respecting the principle in *Camara*, the hearing officers in both the hearing processes leading toward criminal prosecution and the process establishing tortious liability relative to code provisions should be kept free from the hierarchical sequence. At least the hearing officer should be appointed by the highest executive officer of the jurisdiction served and confirmed by the legislative body. Even more effective separation could be secured if appointment was made by a governor and confirmed by a state legislative body. An additional advantage to such action would be the use of such hearing officers as circuit riders. This assumes that state legislative action provides sufficient uniformity to the codes within the state jurisdiction so that both tort law and code provisions would have somewhat uniform integration.

Once such a quasi-judicial operation was created it might well satisfy the criteria advanced in *Camara* to support the issuance of entry warrants. This matter may prove of some importance if Mr. Justice Clark's fears prove well founded.[2]

The quasi-judicial neighborhood equity court is not proposed as an entity dependent upon the range of administrative expertness present in what might be called typical housing code staffs in even larger cities at present. Some use of a wider gamut of social and economic competence is indicated, especially if the court is to consider problems involving substantiation of market values of properties, costs of compliance involving complicated construction, and projection of estimates of values of completed undertakings in regard to rent expectancies. Although such powers are not infrequently delegated to housing code administrators, few jurisdictions are competently equipped with staff to perform the expected functions.

The neighborhood housing equity court would acquire jurisdiction in one of two ways in individual cases. Since it is ''civil'' oriented, it would receive complaints from parties under its jurisdiction. A tenant, always conditioned by the clean hands principle, would be able, for example, to bring action against another tenant or against a landlord. A landlord could bring action against a tenant. Outside parties could be involved, within a ''neighborhood,'' as the jurisdiction is defined. The second way the neighborhood court could acquire jurisdiction results from an inspector's findings and subsequent processing. An inspector's report can produce both evidence of violation of responsibilities owed the state and violations of responsibilities owed by one party to another. The same factual condition might very well provide both types of violations.

A feature of the neighborhood court concept is that the party whose rights have been violated by the affirmative or negative action of another party, when the violation is also of the code's provisions relative to responsibilities owed to the government, can rely upon the inspector's report as confirmation of the existence of the violation. This is accomplished by the housing code administrator's sending notice of the inspector's finding to the party considered in violation of the penalty provision of the code and informing him that the violation is a ''civil'' violation under the code's provisions defining the interparty obligations. Both the party eligible to complain and the party against whom complaint can be made are informed of the violation's being registered as both civil and criminal in effect. The party deemed responsible under the civil provisions of the code is given a fixed number of days, depending upon the seriousness of the violation (and this rank order violation system is underdeveloped at present), to comply, or to file a statement of intention denying responsibility and an application for neighborhood court hearing, or to ignore the notice. Ignoring of the notice is considered presumptive evidence that no hearing is desired or recognized. This is entered in the record, and a tentative finding is made by the hearing officer accordingly.

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[2] See p. 78, chapter 9, ''Entry and Privacy.''

A party ignoring his opportunity for a neighborhood court hearing leaves himself open to a finding of responsibility for the violation as charged and makes himself subject to assessment of damages. He also faces an administrative hearing for violation of provision, or provisions, defining responsibilities to the state for which the sanction is a penalty. The non-appearance in the neighborhood court is not a presumption of violation of the criminal provision but is admissible as evidence as as part of the record. In this relation there is no review of the neighborhood court by the administrative hearing process. There is independent appeal from either the neighborhood court or from the administrative hearing to a court of law designated as the appeal body. The findings and decisions of both, or of either court or administrative hearing process, shall be accorded validity. No new evidence can be introduced. If new or additional evidence exists the case can be remanded with or without instructions. As described, there are alternate administrative fact-finding processes, both sufficiently formal to produce an official record and both creating a presumption of validity. No court consideration shall be possible without exhaustion of one or the other of these processes, and the cost assessed against an unsuccessful appeal shall be included in the judgment of the appellate court of law.

If a party defendant, who also by the same facts is in violation of a code provision defining an obligation to the state, complies with the condition set forth in the notice of violation before the case is decided as a consequence of a neighborhood court proceeding, or within the time specified in the order resulting from that hearing, the case shall be closed. This closure is entered in the record, and this entry terminates the record of the violation, which otherwise would come before the administrative hearing to determine liability for assessment of penalty. This condition requires careful drafting of code provisions to create three possible categories of provisions: those that are entirely and exclusively within the neighborhood court, those that are definitive of violations within the jurisdiction of both the neighborhood court and the administrative processes, and those that are exclusively within the jurisdiction of the administrative hearing.

An adverse determination in the neighborhood court does not, however, create a presumption of violation of the obligation due the state, even though the violation is covered both ways by definition. The civil liability is jurisdictionally separate from the penalty responsibility. It is not uncommon in our legal system that the same act is both negligent and criminal. However, the determination in the neighborhood shall be considered as equivalent to the plea of nolle contendere. The determination and record shall be considered a public record and subject to introduction as evidence. It follows that the inspector's report, or administrative action following it, can be challenged. The disposition of the case shall not affect the determination in the neighborhood court, which is subject to attack only on judicial review.

The neighborhood equity court should have jurisdiction to consider the plea of hardship. The record in a case can be pleaded and relied upon in a compliance hearing or in a court review. Such a record is evidence. It does not establish, per se, violation, nor does it establish mens rea. Until American justice matures to the point of recognition that enforcement of either penalty or civil damages may require subsidy in order that the rent level be protected, especially when the expense is related to escalated standards and not to relatively minor repairs of structures that previously complied with structural conditions at the time the housing code provision in question was enacted, realistic justice is impossible.

Important to consideration of sanctions against low-rent-paying tenants is the emerging recognition that rent payments derived from public welfare sources are equitably due landlords, provided they make reasonable efforts to meet reasonable conditions. It is not an adequate defense of a tenant's rent misses, or of a tenant's negligence, let alone of a tenant's malicious destruction of property in order to establish a violation, to claim that rent need not be paid without considering the facts relating to responsibility for the violation and the capacity of the landlord to make the investment. Honesty is not to be considered a "middle class" virtue for which the underprivileged are not accountable.

It can be expected that the neighborhood equity court will produce data supportive of the conclusion that a small minority of tenants require a degree of continuing supervision that approximates wardship. This hard social reality has been brushed under the carpet long enough. A purpose of the neighborhood equity court is to encourage both participation and responsibility. To do this some method combining education and persuasion on the one hand, and segregation of the unresponsive on the other, is essential.

The neighborhood courts operate under procedural rules made by the head official of the housing regulation system or under his responsibility. They should be made by regularized processes, with an eye to educational comprehension, particularly by those affected directly. Some consideration should be given to periodic revision through like considerations. In local areas having manager government, it seems desirable that the rules emanate from the manager's office.

The application and interpretation of the provisions of the code in particular cases should be left to the hearing officer. Although responsibility is undivided, there is good reason for the hearing officer to consult with other local officials who may become involved in court review processes. It will again be emphasized that court review is limited to questions of law or jurisdiction and that there seems no good reason why nonconforming behaviors should not be prosecuted by the regular local criminal prosecutor, who is usually a county officer. No advisory opinions are recommended, although consultations within the frame of professional responsibilities with local officials is considered valid.

A note of sanctions seems appropriate with reference to the existing legislation in New York State, which is deplored in its present perspective. Under this law[3] the Welfare (Social Service) Department is considered to have a substantial degree of responsibility in effectuating code compliance. But its impact is one-sided and its actions are not well based upon official decision. Tenants are excused from paying rent to landlords when code violations exist. The determination of such existence of violations is faulty to support such drastic action. The landlord can be deprived of his rent independently of whether he or the tenant caused the violation. There is no recognition of the principle of clean hands, and rent money goes into escrow with little effort to determine the condition of the landlord to comply, especially if he is deprived of money needed to make the compliance investment.

The neighborhood court can be given jurisdiction to make the system more equitable and effective. The court should be able to fix responsibilities and determine obligations on a mutual basis. Before rent is withheld, a finding should be made that the action is in furtherance of an undertaking within economic capacity, as well as a result of irresponsibility. Some method should be devised to hold tenants responsible on a mutual basis for violations they are responsible for creating. Perhaps a committee from welfare and the housing administrationm with the court hearing officer, could administer a mutual responsibility system, including determination of time allowances for construction and payments. As long as a tenant makes payments on time he is protected against eviction. If a landlord fails to meet determined conditions he is subject to an additional penalty and his case transferred to the administrative court discussed in the previous chapter. It is most important to realize that the welfare or social service function at least recognizes involvement, a condition of the highest importance for the future if it can be channeled competently.

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[3] Section 143-b of N.Y.S. Social Services Law, "Avoidance of abuses in connection with rent checks," authorizes withholding of rental payments for violations, or application to housing rent commission for rent reduction.

More than one neighborhood equity court can function within the province of a single housing code administration. Each area qualifying with general conditions fixed in state enabling legislation should be considered eligible. The organizational function should be within discretionary limits of the administrator of the housing code and approached as an exercise of rule-making authority.

The neighborhood equity court, or courts, within a housing code jurisdiction should have no rule-making discretion. This discretion is reserved to the housing code administration. If the state within which such a system is organized has no general legislative guidance on rule-making procedures it is recommended that the guidelines in the Federal administrative procedure act be followed. Likewise, if there is no competent guideline system in state legislation relative to administrative hearings, the Federal act should be a foundation from which adaptations reflecting state judicial pronouncements can well be developed. In larger code-enforcing systems it may be possible to rely upon staff competence within the agency itself. This is not, however, possible in most jurisdictions. A state clearance system using the state attorney general in an advisory capacity would seem possible in some states but not in others. At least enabling state legislation can clarify the responsibility of local city attorneys or soliciters.

At present few, if any, states are structured to permit competent administrative review by state agencies of local quasi-administrative decisions. Attention should be given this situation, no matter whether a single administrative adjudicatory process is used in local jurisdictions or whether the double and parallel system advocated in this analysis is used. There is more need for a state administrative review system if a state coordinating agency is considered desirable, and the use of state standards as minima would support such reviews to develop and maintain uniformity, especially in the construction of local codes and their relation to negligence standards. The development and use of complex expertise in meeting the issues inherent in existing housing code jurisdiction, let alone compounding this with the functions of the neighborhood equity courts, presents problems of proper distribution of uniformity over statewide jurisdictional areas. Regard for local autonomy adds additional restraints in meeting local political interests. This slightly developed subject of distribution of power and responsibilities between local and state administrative agencies is worthy of further study and should present substantial opportunities for experimentation in the future. If states ignore this opportunity they will have little justification for protest if they find that Federal programs move into what is little more than a vacuum at present. State action, intelligently developed, can go a long way toward preempting the field and still leave a Federal province for research development and coordination toward national goals.

The character of the hearing and its results, in both the compliance and equity court systems, should focus upon record making. The hearings themselves should be relatively formal under guidelines and regulations emanating from the housing code or housing regulation executive head. The hearing process follows a systematic sequence treated as counseling and conference in which informality is dominant. (see chapter 10). The hearing officer should make a reviewable record supporting a presumption of regularity for purposes of court review. He should make a finding from this record, and from this he should make a recommendation. This recommendation is to the chief executive of the administration of which the code at issue is a responsible element. The decision, usually in the form of an order, is considered technically the responsibility of the executive head. Normally he will support the recommendations, but for policy reasons, he should be in a position to remand for further consideration as part of his discretion when he considers that further information, or reevaluation, is indicated.

Appeal to a court from either system is from the chief executive of the agency and not from the hearing officer. This permits the hearing officer to exercise a role as witness for the executive and should go some distance to ensure unity in policy without destroying the independence of the hearing process itself. It also permits the use of other experts in the administrative system to explain their positions further. This procedure should facilitate the judicial review system's provision of maximum guidance to the quasi-judicial processes and minimize the political influence of the head of the agency involved in particular cases. The agency head, however, maintains constant contact relations because of potential impact upon policy, and particularly upon the rule-making processes, which should be responsive to both hearing experience and judicial review guidelines.

Technical questions about forms, time allowance for appeals, use of legal counsel, costs and their assessment, penalties for ignoring subpoenas issued against witnesses or parties participant, etc., will become important if development of particular state and local systems is undertaken but are considered beyond this analysis, which is limited to what is hoped to appear as a basic change in thrust and jurisdiction designed to overcome existing troubles in code administration.

Chapter 15

POLICY GUIDANCE PROCESSES

Most administrative systems pointed toward criminal enforcement assume that the law they enforce is clear and that the administrative process consists of discovering violators and seeing that penalties are imposed to compel compliance. With such a premise the need for counseling about policy, or the use of processes designed to clarify rules, seems relatively superfluous. At least neither policy counseling nor rule making play a conspicuous part in most administrative systems. The findings of this study, however, consider that the housing code program is not effective in its present reliance upon criminal penalties and that the language in the codes is not sufficiently explicit to support criminal prosecutions. The result is that housing code administration suffers from inadequate conceptual framework and focus.

Two formal processes are used in housing code administration that provide guidance from outside the staff. One of these is the appellate review agency. The other is a somewhat crude approach to deliberative policy clarification through use of outside officials and interests with representation of affected clientele.

Boards of Review or Appeal

The process and jurisdiction now posited in review boards operate to defeat the development of certainty in the law; the decisions do not lend themselves to the evolutionary growth of precedents. Such decisions are not spelled out as are the judicial products in courts of law. They are summary in scope. Little, if any, attempt is made to clarify the criteria by which hardship is given specific meaning in the particular case at hand. The records of decisions cannot be examined with expectancy that principle can be derived. Such records as exist are normally too limited in scope to surmount the uniqueness of the facts at issue. Decisions can be said to be ''conscionable'' or ''case by case,'' and comparisons between different cases are practically impossible. Such a system lacks the essential quality of moving from uncertainty to certainty that characterizes the traditions that have made the common law so successful. Numbers of cases do not clarify the meaning of ''hardship''; they simply evidence the conscionable differentials of officialdom. If some way would not be found to reduce this confusion it might be justified as a least evil. But this is not the case. The development and utilization of rule-making processes and the use of rules to guide compliance hearings would eliminate much of the difficulty. At present the boards of review contribute unexplained decisions, and records do not, and cannot, reveal the method of the criteria supporting such decisions. Rational men can easily consider that such a system too easily covers arbitrariness, incompetence, sloth, or corruption. Good administration does not leave such openings for misconstruction with resultant undermining of expertness except when unavoidable.

Legislation: Codes and Rules

Policy determination in housing code administration is a conglomerate from many sources. The complexity operates to make program development, or fitting housing code compliance systems into broader contexts, extraordinarily difficult. Historically, cities have been considered legal creatures of state governments. But HUD imposes, in effect, requirements directly on cities and counties if they enter the gates of Urban Renewal. The ''bait'' has been great enough so that it is uncertain whether cities, in relation to housing codes, are more creatures of Federal than of state authority. More sinister is the fact that the free operating reliance upon local democratic processes has been corrupted. Housing code administrators cannot look for guidance from mayors or city councils. They spend more time studying Federal papers and guidelines that are a much firmer restraint than is ascribed to the iron curtain. HUD requires a workable program, but the criteria have little relation to local free political decisions.

Housing codes are much more likely to find changes impressed upon their coverage through Federal than through state authority and the authority is not direct Congressional enactment; it is bureaucratic edict. Enforcement of politically insecure programs that are pressured from outside the jurisdiction are beyond the tradition of local government. This is made more complicated when cities, to partake in the bounteous Urban Renewal feast, must get permission from their respective states. Probably the greatest handicap to development of responsible rule-making processes, designed to combine local expertness, political values, and representative voices, lies in the constant meddling from Washington. This intervention may have the unintended result, however, of galvanizing states into action to protect their heritage. When this happens, and it is beginning to show signs of vitality, the state political machines will see that HUD learns the elemental conceptions of Federal distribution of authority.

HUD's emphasis upon local code systems, ignoring both suburban and exurban areas, is producing unbalanced administrative policies. HUD has a somewhat curious dichotomy in its approach to local units. It is overwhelmingly concerned with special areas within cities, not with cities per se. A working hypothesis exists that for urban renewal the district approach is normal; for housing code administration it is normal to have citywide uniformity. This uniformity, however, is out short at municipal boundaries although the housing environment at political boundaries is usually undistinguishable on both sides. Presumably the rationale for this scheme of things is that there is something unique in the city that is not disrupted by special areas, but what is unique in the city stops at its boundaries. It is natural, therefore, that housing codes should be enforced on a citywide basis. Scientific standards relating to health and safety are at the bottom of this rationalization; everyone in town should be protected by ''minimum standard'' codes. Out-of-town conditions are different.

The foundations for the rationale are inadequate. Minimum standards, if really related to health and safety, are, or should be, universal as a basic right of American people, or at least a right of state citizens. But there are greater differentials in housing environment within any large city than exist along most political peripheries in most directions.

Rule-Making Delegations

When rule making is considered as part of the basic equipment of housing code administrators it is simply granted as a power to the administrator. It is rare that a code undertakes to give instructions on how rules are to be made. There is practically no evidence that housing code writers or drafters consider the principles in such well-considered models as the Federal Code of Administrative Procedure or similar state codes to have any important role in operating systems. The basic elements in housing code rule making, however, are such that the application of structures and procedures considered in such documents would work advantageously.

Some variety does exist, however, in treatment accorded rule making in codes.

The unconditional delegation of rule-making authority does not imply that boundaries are limited or that methods need be arbitrary. Such grants of power imply that the responsible administrator can apply known and generally approved principles and processes. Unless otherwise restricted, effective rule-making involves optimum use of representational participation through which those most directly affected can be heard and considered. The process should be viewed as a two-way interchange of ideas through which the citizen learns of the problems confronting the administrator and the administrator is enabled to select the alternative most conducive to the success of his mission. It is not with what might be called ''housekeeping'' or ''manuals'' policy statements that this study is concerned. It is with the formulations of behavioral standards that control the rights of citizens, particularly owner-occupants, landlords, and tenants, who are the immediate clientele of code administrators.

Rules supplement legislation and provide clarity and interpretation, permitting inspectors and citizens to know where rights and duties begin and end. In some jurisdictions the separation is not complete. The housing code administrators, for example, in Hammond, Indiana, Joliet, Illinois, and Providence, Rhode Island, are empowered to make potential rules but must submit them to a legislative body before they acquire legal status. Sometimes affirmative action by the legislative body is required, and this, to a considerable extent, abolishes the difference between statute and rule. In Providence the administrator initiates, but if the council does nothing, the rules become effective at the end of 30 days. In Lima, Ohio, an unusual system is provided; the administrator initiates and submits his proposals to a board that can approve or reject. If it approves, the rules are sent to the city council, where approval or disapproval is necessary.

In Salt Lake City some guidance on procedure in rule making is provided. The health officer, as code administrator, must submit proposed rules to a public hearing, and the legislation determines the time and place controlling such hearings. In Augusta, Georgia, a somewhat similar procedure is followed with the additional requirement that after a hearing the rules are submitted to the city council. But many, if not most, codes simply ignore the rule-making process or the conditions defining relationships with legislative bodies.

Sometimes the rule-making advisory or determinative agency is combined with appellate functions that involve constructions of the provisions the agency previously considered in another capacity. No intention is evidenced to give the impression that such mixing of functions is against the public interest. In small jurisdictions the general knowledge of community problems and the absence of competent civic-minded people may well find the public interest advanced through the combination. In Atchison, Kansas, where the housing code is enforced by a ''public officer,'' an advisory board is provided that advises both the administrator and the city commission on problems including housing. This type of relationship makes the agency advisory. It also is to give advice to property owners relative to code compliance problems. In Gary, Indiana, a somewhat similar board of five members ''may aid, assist and/or advise owners or occupants.''[1]

A number of extraordinary, and experimental approaches to the counseling and rule-making processes deserve notice. In Warren, Ohio, a ''Housing Coordinating Committee'' is a body of seven city officials serving in an ex-officio capacity. This is clear recognition of the role of housing code administration in a larger policy complex. This committee can ''recommend procedures for coordinating the housing inspection services of the several departments of the city government, including changes in existing administrative practices and inspector training programs.'' Further than this, the committee is responsible for ''a system for the exchange of housing information...policies, procedures and techniques for effective interdepartmental administration of all state laws and city ordinances relating to housing, sanitation, safety and rehabilitation.'' A thrust into the future appears when the committee has been charged with recommending uniform reporting and recording forms and ''centralization of inspection records and reports.''[2]

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[1] Housing Code, sec. 5-1602 (b).

[2] Ordinance No. 4903/55, Powers and Duties (a).

The format of rules and regulations, especially the relationship of these to code provisions and the composite so that it is easily communicated to those affected, vary, with but few examples of a high degree of understanding of the potentials involved. One of the best examples of this form of achievement is to be found in the city and county of Denver, Colorado. The board under which these rules and regulations have been produced also acts as appellate body. The processes used in developing the rules are uncertain about the use of representative interests from the community, but the product indicates that wide consultation took place. A somewhat parallel and exemplary body of rules has been developed in Marion County, Indiana. Both the Denver and the Marion County administrations cover countywide areas.

The City of Joliet, Illinois, published in 1961 a significant version of its housing code that is suggestive for other jurisdictions relying upon relatively simple codes that include a substantial number of provisions in the performance manner. The first 10 pages, more or less, contain the performance or general provisions arranged in 10 sections. The last five pages, more or less, is entitled ''Supplementary Regulations'' and its declared purpose is: ''To facilitate public understanding and better administration of this ordinance.''[3] Both the concept and the execution evidence care and good judgment, although the scheme doesn't quite come off. The supplementary regulations help but still leave considerable uncertainty. Probably its greatest utility is to bring the language into simple form. As all codes are construed, whether they say so or not, standards are local good practice. Finally, the Joliet code does not provide for the making and publication of the supplementary regulations. It apparently rests on implied authority.

Performance Standards: Rule Making

As housing code administration achieves professionalization with trained inspectors, there should be a parallel development of performance standards in the codes themselves and more elaborate rule making to fit such standards to local conditions and keep them adapted to scientific and political values. At present code provisions are a combination of performance and specification standards. This is confusing because one type of standards communicates particular expectations while the other communicates only a general and somewhat abstract element of value. Confusion is confounded when it is realized that specification standards can much better support criminal prosecution, primarily because the definition is clear and it is, therefore, easier to assess violation. It is the presence of performance-type provisions that create the greatest need for rule making. This process, if competently undertaken, can give more particular meaning to some performance provisions, but it is practically impossible to reduce others to specification terms. Careful selection and training of inspectors, with skilled supervision, is about all that can be done to avoid arbitrary code enforcement in such cases.

An earlier analysis of the problem of code provisions clarifies the findings in this study.

> Because violations are defined imprecisely, enforcement must depend heavily on the subjective judgment of individual inspectors. Studies show that different inspectors list different violations for the same building and accord the same violations varying degrees of seriousness. Moreover, after viewing a dilapidated building, an inspector may be less rigorous with a neighboring structure in better condition; and in extremely bad areas, because of the apparent futility in trying to improve conditions, inspectors may not write violations at all. ... To eliminate this subjectivity, it has been proposed that an agency draft regulations clarifying such broad standards

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[3] Ordinance No. 4575, approved August 21, 1961, sec. 11.

a ''shall be kept clean'' and ''shall be kept in good repair.''[4]

Brief commentary may help clarify the nature of the extent to which rule making can facilitate clarification of standards. If a code requires ''adequate light'' an administrative rule can determine the way it can be measured relative to location in rooms and objective standards more nearly reached. ''Hot running water'' can be given temperature and duration of flow in rules. Air movement, temperature of rooms, purity of air and water, even toilets and bathing facilities can be required in general terms and given functional specificity through rule-making processes. Of course, the technical competence must be present in the formulation of the rule, and there is reason why the rule-making process should be as open and public as educational processes.

What do codes provide to bridge the gap between the performance standard and the duty or requirement formulated in behavioristic terms? As has been noted, fewer than half do anything at all. This leaves to the inspector a type of discretion that easily produces confusion or discrimination. Even if he is ''trained'' in what the head man in the program considers the correct meaning of an ambiguous term, this is no guarantee that the occupant who admits that he is the one who did whatever was done knows for sure what he is charged with. The inspector says ''the place is dirty''; the occupant says ''you ought to have seen it when I moved in, but its clean now.'' Should the occupant be fined or put in jail for disagreeing with the inspector? It won't help to bring the top administrator into the story and have him state that he agrees with the occupant, or with the inspector. If nobody is certain what the law requires, the whole matter needs reconsideration.

Is it possible for the administrator to give more precise meaning to the code and see that the occupant is informed of his sharper definitions of responsibility? If codes are to be enforced, and contain such provisions, experimentation seems necessary. Authorization to make specific definitions so that they will have the effect of the code itself is essential. At least in nearly half of the administrative systems examined the administrator has a free hand to try. But his hands are not always completely free, nor should they be. The subordinate pattern of rules should reflect the toleration and support levels of the area in which they are to take effect. This, in turn, means that some way should be found to obtain a degree of participation of citizens in the rule-making process. No very good example of such a system has come to light in this survey.

Another aspect of eliminating uncertainties in performance standards requires the formulation of definitions and procedures that fit into the total operational system of the governmental unit. This aspect of code administration has been given some consideration. In Minneapolis a four-member advisory body of other related city government administrators is associated with the code administrator to give advice on policies. Honolulu, Hawaii, and Flint, Michigan, are among cities having ''housing advisory boards.'' In Providence and Warwick, Rhode Island, there are technical advisory committees made up of members serving ex-officio with other members subject to being added by the mayors. Some of these bodies, especially in Honolulu and Flint, also exercise other functions.

A tragic element in code administration is the failure of legislative bodies to understand the limitations of police authority when confronted with lack of ability to meet code compliance costs. Many codes include the word ''hardship'' as an element in determining relaxation of compliance standards. Hardship might well be said to be the most pregnant example of ''performance'' standards in housing code administration. Not only is its meaning imprecise, but also, even when accorded meaning, it leaves the administrator with almost complete inability to meet the realities before his eyes. This problem is beyond any meaningful solution through rule making, although rules to provide cooperative help in seeking loans or other aids may be possible, even though these are of little practical help when hardship flows from inability of rents to cover operating costs.

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[4] ''Enforcement of Municipal Housing Codes,'' *Harvard Law Review,* vol. 78 (1965), 812.

Some cities try a policy of avoidance. In Providence, Rhode Island, for example, no provision is made for consideration of hardship issues in the jurisdiction of the board of appeals. This is not lack of humanitarianism but surrender to the harshness of the national policy.

The cumulation of information in this survey relative to code enforcement problems makes clear that the problem of reducing performance to specification definitions will not materially affect the overall problem. It will help, but this help is limited. Cases of obtaining compliance usually do not hinge upon technical issues of whether facts are included or excluded within ambiguous definitions. American practice seems much like the expected behaviors under the Canadian code provisions that local ''good practice'' shall play an important role. Or perhaps the administrators only undertake court action in extreme cases in which the defense of technical noncompliance is unlikely. There are two recurrent types of defense, neither of which involves critical evaluation of code definitions. One type of defense is ''the violation is not my fault; I didn't do it,'' to which landlords tend to add that the violation is not within normal wear and tear; and the other is ''I can't afford to meet compliance costs.'' The tenant pleads poverty, the landlord pleads that the expenditure is incompatible with reasonable profit. Few cases get to final stages in which the issue is: does or does not a violation exist under the definitions of the housing code?

In effect this means that the criminal enforcement system is so ineffective that the cases are not pled within the framework of its competence. The sharpening of definitions would be necessary if the criminal enforcement process was applicable. In some cases it is, and in these emphasis upon more effective rule-making processes is important.

Further analysis indicates that basic difficulties lie in the economic aspects of the problem and particularly in the absence of either clear standards or effective processes within reach of the parties through which reciprocity of obligations occurs. The housing regulation system has unduly attempted to transfer what should be recognized as reciprocal obligations to criminal definitions. The other aspect is the failure to recognize that the tenant must be held accountable for his conduct if the landlord is to be so held and that the landlord cannot be held accountable for expenditures that make it more advantageous for him to abandon the building. Rule making is needed, but only clear delegation of authority to come to grips with the realities of the issues.

Housing Codes and Information Base

Housing code administration is too self-centered. Its potential to provide critical information relative to housing supply and resources has not been developed. The availability of mechanical and electronic computing devices should have an impact upon housing code administration that gives its fact-gathering capacities new impetus and meaning.

Housing code administration considers fact gathering a first step in obtaining compliance. The character of the information obtained is akin to that obtained by a police inspector. This is unfortunate because the processes of obtaining compliance through criminal penalty are not overly successful and are poorly conceived to obtain increased low-rental housing. Instead of assuming that renting housing is a right, subject to police intervention, it is recommended that rental housing, at least in the price levels related to welfare allotment rent payments, be considered essentially a public utility-type operation in which owners are entitled, through prudent management, to obtain a reasonable profit. To effectuate such a shift would require much greater knowledge of the housing supply, capacity to make decisions about life expectancy of buildings, and keying such decisions to neighborhood status. We simply lack the vital information to establish and operate a housing regulation system, and the present housing code program is at best a partial and stopgap enterprise.

Licensing involves applications from would-be landlords to engage in a business in which they meet certain governmental priorities as a condition to legal operations.[5] But the application can well provide information that is lacking about housing resources. Such information would help relocation efforts as well as social planning generally. From this viewpoint housing code administration is a source for planning at a higher administrative-political level as well as a segment in an overall regulation system. The acceptable application for operating rental housing can well disclose items such as rent expectancy, size and characteristics of rooms, relationship to entry and egress, facilities and special accommodations as well as contain a set of provisions relative to code compliance. It is only with the provisions relative to code compliance that the housing code administration is directly concerned. Financing of administration should respect the multiple uses and the fact that the code administration is a vehicle for other purposes as well as a self-contained enterprise.

Although technically beyond the reach of an analysis concerned with the improvement of housing code administration, a recommendation is made that licensing systems be generally adopted and that, concomitant with adoption, some arrangements be made for the development of a data center related to using information collected, in part, from housing code administration. This center should be intimately related to planning purposes and have staff competence as integral with the planning function. Needless to say, a coordination or integration of land use planning and social factors, including housing and other factors, will be necessary to achieve fully the potential that will be manifested through a competent housing code licensing approach to all rental housing within an area.

At other places in this survey the strengthening of neighborhoods through more effective planning and participation of resident-citizens is recommended. It does not seem necessary to do more than ask the question: What would be the importance of substantially accurate and complete information about housing resources in giving meaning to these undertakings?

Who Should Make Rules?

Rule making is a bridge between legislative action concerned with general policies and enforcement processes that require specific definitions. In this sense rule making is a continuation of the legislative process and should continue the principle of representation in the relatively narrow problems that flow from legislative initiative. A double problem of representation presents itself. There is the necessity of recognizing that code standards, whether they are designed as criminal definitions or as negligence standards, or even as community guidelines, involve agreement patterns of various experts. In larger governments most of these essential participants can be found within the official family and usually have common interests. In smaller governments some ''patching'' can be done through adding nongovernmental personnel, such as architects, lawyers, psychologists, social workers, and others. But in very small places this potential recedes, and the only conclusion that can be reached is that the unit lacks the necessary potential for effective development of delegated discretion.

A quite different problem exists in representing interests in the same value system as in a representative legislative body. The balancing of citizen interests is, however, fundamental if housing code administration is to have basic support. In this perspective, housing code rule making is both a concentration of balanced community support and a means of extending understanding of code problems to the citizenry. It represents, moreover, a sounding board upon which the official administrative ear can learn much about the way his problem is going and is being received. It is most important that the most directly involved interests be represented and heard; confrontation in the stages of policy development are easier to live with than after crystallization has occured.

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[5] An example of licensing is found in the Housing Ordinance of Augusta, Georgia. Its code provides, ''The owner of every rooming unit, rooming house, apartment or other dwelling for rent, or other rental unit, shall register annually during the period January 1 through March 31 the number and location of each such rental unit, with the Health Officer and shall obtain a permit therefor. The Health Officer shall charge a fee of fifty cents per year for each such rental unit registered, except in the case of rooming houses, the fee shall be one dollar per house''(2.2). This ordinance does not maximize the licensing system. It does not provide information critical to effective use for important social purposes. As it stands it is little more than a revenue measure.

Housing code rule making presents a particular difficulty in that those most directly affected are uninformed tenants and often almost equally uninformed landlords. Such people are difficult to involve. They are difficult to organize, and it is more difficult for them to organize themselves in effective spokesmen-led groups. Particularly the tenants, often with enough time on their hands, are capable of vigorous protest, especially in the hands of outside organizers. Their ears are not easily bent; their homes do not provide widespread newspaper circulation. Television is their common medium. These matters cannot always be taken fully into account, but they should never be forgotten. In other words, the rule-making processes cannot overlook the people most affected. But the real estate interests, bankers, mortgages, builders, and unions also have a stake in housing code programs that are important. It might be a significant note that the rule-making processes are the fulcrum upon which the balance between persuasion and enforcement is best observed and influenced.

Housing codes are best conceived as a collection of performance standards, with a hard-core base of minimum requirements. The application of the performance standards should be the province of rule making, followed by selective subsidy and penalty enforcement. A basic criterion in formulating rules should be regard for local values. The state should provide the conditions to ensure that the local autonomy will fit into an integrated pattern for the local area and that this pattern will likewise fit into the state-wide administrative scheme with its balance of central and local discretionary delegations. The capacity of a larger social-planning enterprise, of which housing code administration is an arm, should be recognized in coordinating policy. From this policy, with competent expertness, should be constructed zoned areas that reflect the cultural differentiation and the environmental control pattern. Within these zones housing code administration, as part of the larger control system, should be enforced uniformly under provisions appropriate to the zone.

This study considers that codes should more carefully define landlord-tenant and occupant standards and that landlord-tenant relations should be delineated through the substitution of rules and regulations, made under code provisions, for the somewhat dilapidated remnants of the law of landlord and tenant. Thus the code becomes an agency for the redetermination of negligence and contract-oriented controls that are essentially ''civil'' and based upon mutual obligations. It has previously been contended that the use of neighborhood equity courts is indicated, and these court units can well be established as coordinated elements in the zoned-area approach. Note that it is not argued that each special area or zone have its own rule-making system. The zone is a ''package'' unit, and its rules are made to ensure uniformity among categories of zones. This makes the rule-making process essentially one of citywide or countywide scope, but the zoned requirements can be made with special concern for accommodation of local participation from the type areas in which they have special operational effect.

Rule-Making Sequence

The use of hearings in the rule-making process does not mean that the hearing process, or its procedure and agenda, is left to its own resources. Rule-making hearings are essentially advisory arms to the administration; they are bodies to which problems are taken for help. They advise and give opportunity to guage sentiment for and against propositions. They initiate suggestions, and in this they provide eyes and ears for the administrator.

The official-family counseling meetings through which common problems are brought into discussion and resolution sought can be considered less formal than hearings in which interest groups and direct citizen participation are critical. Housing code administration is related to both types of processes; hopefully the official-family interrelationships will be undertaken by the highest political executive within the jurisdiction, or provision made for such authoritative processes under his official eye. It is with the hearing processes relating to policy and rule derivation that guidance in procedure and in clarifying the official role seems most important.

It is assumed that the representative nature and the public character of the hearing exist. The administrator is responsible for the agenda and guiding the discussion; in smaller jurisdictions this personal participation is of high importance. There are really two stages or two sequential elements in the development of rules through use of hearings. The first phase is the presentation of a problem or problems. The alternative approaches should be carefully documented and not left to abstract consideration. This is termed the agenda stage, and it is directed more at developing appreciation for an unsolved problem than at seeking approval of a tentative solution. Such an approach is most likely to ''smoke out'' latent dissatisfactions and protest that might otherwise become troublesome at a later phase. It is to the administrator's advantage to discover all the ideas that can be found and all the protest and support to ideas that he may have brought to, or developed within, the course of the hearing. As subject matter changes from meeting to meeting the invitation of specially concerned or interested parties may prove important. Participation should never be considered limited to residents alone.

A second phase is concerned with proposed language statements derived from the first-phase discussions. Advance preparation involves checking with interests specially involved in the first phase and ensuring as much open support as possible. It is desirable to have initiative taken outside the administration whenever possible to ensure understanding and prevent the hearing from becoming argumentative in the direction of an adversary proceeding. Confrontation should be kept among representative interests rather than between representatives and administration. This often takes advance planning and groundwork. It is important that the expertness within and without the administration be marshalled and clearly have a scheduled role. Insofar as possible the use of the same experts as were present and participant in the earlier phase meetings should be relied upon. It is important that every effort be made to ensure wide participation; the process is critically educational. These matters should not be left to chance, especially when important matters are under consideration.

The third phase in the rule-making process is publication and dissemination of the rule that emerges. The administrator should carefully document his findings from the hearing so that the resultant rule or regulation emerges as a product of matters considered within the hearing itself. It is incompetent for the administrator to rely upon information or technical data not discussed. The rule should emerge from the hearing process, and the skill of the administrator should relate to this process just as much as to the content of the rule per se. The publication should be by a process that relates to the clientele. In general they are less easily reached than are most administratively regulated groups. Any organization that exists, or can be stimulated, should be made use of throughout the rule-making hearing sequence, and it should be specially critical at the juncture of dissemination of rules. Since it is proposed that the rule-making function be expanded and formalized in housing code administration, this infrastructure for distribution of information is increasingly a concern of the administrator and his staff as well as the higher-ups in the governmental process. Close and confidential relations with press, radio, and television people is important. Few housing code administrators have the public relations staff personnel to achieve independent community communication. In cities or counties in which public relations staff exist at a higher level it is important that this element be given recognition.

Neighborhood Policy

It is essential that housing code administration, both in its policy-setting aspects and in compliance processes, become more firmly integrated into neighborhood problems. The neighborhoods are primarily those in which clustered poor reside and in which, in most larger urban centers, the issue of rental prices is substantially conditioned by the presence of public housing or other subsidized undertakings.

The same logic that supports the focus of attention of Urban Renewal upon project areas applies to housing code administration. The logic that supports land use zoning also applies to housing codes. More important than either of these is the fact that housing is not simply a dwelling unit in an area categorized as one-family, multi-family, or parallel categories defined in terms of density. Housing is where people live, and they do not live in isolated dwelling units. They require, especially in low-income areas where public transportation is dying, the availability of shopping centers, churches, schools, recreation facilities, pure air, freedom from excessive traffic and noise, street lights, sidewalks, available health centers, counseling services, and other resources. Neither zoning nor housing codes approach this complex of environmental elements. We do not design and provide administrative base for neighborhoods but for parts of corporate areas. The perspective is in need of correction.

As part of a new perspective the use of ''zoned'' housing codes deserves serious consideration. The most immediate argument to support this contention lies in the approach of Urban Renewal to urban problems. Urban Renewal considers special areas the foundation of attack upon such issues. It has not, however, managed to get overall pattern and sequence well integrated into the approach. The Community Renewal programs, undertaken hopefully on a rather comprehensive scale a decade ago, offered opportunities in this direction, but the attainment of objectives failed. This failure was partly due to lack of internal understanding of potential, a resultant bad educational program as support, and probably mostly because of reliance upon consultants who had limited vision of the possibilities inherent in the approach. Few cities ended up with a coordination of programs or a factual foundation to support cohesive social planning able to transfer social and housing plans into capital budget terms and total area land use redevelopment. The failure of a particular program should point the need for reevaluation of the means used. The objective of comprehensive urban planning is even more vital today than when CRP's were initiated.

Urban Renewal has gone back to its piecemeal approach without comprehensive planning, except in the traditional sense. This means that grandiose designs are laid out and the administrative process is whittling them to pieces. Comprehensive planning has not developed to the point where it is a guiding hand to fitting neighborhoods, as building blocks, into integrated patterns to meet overall objectives. Housing code administration can be a means, along with other coordinated processes, in moving toward more effective neighborhoods.

More critical examination of land use zoning and housing codes clarifies their common characteristics and complementary nature. Both involve reliance upon health, sanitation, and safety. Historically emphasis has been placed upon these elements because it has been necessary to establish compatibility with, and extension of, the traditional concept of nuisance. But neither zoning nor housing codes are primarily health or safety oriented. They have much broader bases. As developed in *Euclid v. Ambler Realty Co.*[6] the dominant element in zoning is economic protection of neighborhood land values. When this concept is broken into its constituent parts, the emergent result is that amenities must be considered relative to neighborhood character; uses that reduce land values of neighbors can be prohibited even though the restraint reduces the immediate profits of the existing owner. This is police power, and its use is both beneficial and dangerous. The Constitution has been construed to permit such restraints only prospectively; established uses that were valid at the time the restraining law was adopted are protected for at least a time interval to avoid undue hardship.

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[6] 272 U.S. 365, 71 L.Ed. 303, 54 A.L.R. 1016 (1926).

Practically the same itemization can be made, and with equal accuracy, relative to housing codes with the exception that their provisions are presumed to be much more critically identified with health and safety. This is slightly justified, but the difference, if measured against demonstrated relationships between code provisions and healthful conditions, is almost insignificant. This is not an argument that the demonstrated relationships of housing, or zoning, to health standards should not be imposed as restraints under the police power. It is simply an argument that the provisions in housing codes concerned with convenience, amenities, economic well-being of neighbors and neighboring property owners, aesthetics, or such other items as give meaning to values that are politically accepted and result from concensus patterns should be treated alike in both administrative processes. In other words, housing codes should not be imposed retroactively so that the expense of compliance is shouldered by owners whose property was "legal" at the time such codes were adopted. Again, it is necessary to accept the conditions that are demonstrably identified with health and safety; these should, in the tradition, be treated as nuisances with the burden falling on the hapless owner.

It is the contention of this plea for reconsideration of "zoned" codes that a neighborhood be treated as a unit and with uniformity of standards and of enforcement. How is a neighborhood determined so that it will be "legal"? The answer probably is sufficiently clear from the Supreme Court's consideration of what are now recognized as landmark decisions.[7]

Urban Renewal, at this time in our history, evidences durability. This means that cities must be expected to program successions of demolition areas until resources run dry or "slums" are eliminated. It means that there will be sequential projects. This in turn creates a condition in which some areas will be marked for demolition within 2 years and some at later dates according to the long-term plans. Some areas will be rehabilitated, and mature considerations of such areas will force conclusions that these, in turn, have life expectancies. Without consideration of this deterioration and renewal cycle the foundations of neighborhoods are so uncertain that the duration of investments is confounded. This, in turn, can be expected to force owners to maximize immediate profits. In this pattern the stability of low-rental housing depends upon effective planning, and planning must have a time factor in recognition of the cyclic nature of building and neighborhood use.

Is it sensible to ask an owner to put a new bathroom in an apartment that is scheduled to be torn down, at public expense, within a short time? Is this owner to be dealt with in the same way that another in a new subdivision is to be treated? Admittedly a bathroom is a convenient factor for a family. If the family has been subsisting without more than half-time use of a common bathroom for a period of years, is the public interest so vitally affected that either the building should be vacated or the new bathroom installed? The answer might be that the taxpayer will reimburse the owner at the time the building is torn down. Does this indicate a competent public policy? And what happens if the neighborhood is one not marked for demolition for 10 years? Or if it is an old residential district considered appropriately usable for industry? If old buildings are marked up to cover expenses of new bathrooms, sales are hampered. Enough has been indicated to show that a new approach to separate minimum standards and desirable conveniences is in the public interest.

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[7] *Berman v. Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 Sup. Ct. 98 (1954) and *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523.

When the concept of neighborhood is understood as a protected area, carefully determined zoned for a life expectancy of a determined range of years, with public commitment to maintain the environmental elements to make living possible in accordance with an affluent society's values, it is apparent that housing codes should be tailored to areas. The basic area is the neighborhood insofar as housing is concerned. When assurances can be provided, when codes can be enforced protective of such conveniences as can be afforded, and when occupants have a voice in standards that protect landlord-tenant and tenant-tenant relations, a less confused future can be expected.

Integration of the elements of zoning and housing code differentials will eliminate the idea of a uniform housing expectancy over the entire local jurisdiction. The minimum health and safety provisions will be the common denominator, but the housing code will be considered a tool, among others, to achieve enviromental control within neighborhood areas. In a sense the housing code function will be absorbed into an expanded concept of expanded concept of environmental control zoning. The economic dominance in present zoning will become further complicated by the addition of clearer factors relating to livability rather than to protection of property values.

Neighborhood Courts and Rule Making

There is no reason why a rule-making system should not be developed relative to the jurisdiction of the neighborhood equity court. This development, however, should be considered as separate from (1) the function of grand jury determination of cause for consideration by the compliance hearing relative to potential liability for criminal penalty and (2) the jurisdiction over tort and contract responsibilities that derive from operation of civil responsibilities as part of the construction of code and statutory provisions, with possibly some overtones from common-law principles. The independent rule-making role related to the neighborhood equity court is beyond the liabilities fixed by the state in determining public interest and beyond the obligations, under law, between landlord and tenant, tenant and tenant, and both landlord and tenant and other neighborhood residents.

Since it is difficult to devise sanctions for a neighborhood control system, the control mechanism must, normally, be limited to social or internal organizational pressures. There is, however, no good reason why such an agency should not be given authority to expel or condition continued residence within a neighborhood. Some mechanism must be found to eliminate unresponsive families, and no more protective system than one based upon local concensus, with opportunity for hearings and appeals, seems devisable. There must be some determinable place for such families to go, and there should be attached to disbarment a condition of required special service treatment. These matters are beyond neighborhood capacity to supply. Once they are supplied as part of a housing regulative system it is strongly recommended that a rule-making jurisdiction be extended, or developed, to cover control over standards of community acceptability of residents as well as authority to expel after what amounts to traditional ''due process'' consideration. The urgency to come to grips with these basic social issues is important; there will never be effective low-income neighborhood community well-being until some discrimination can be effected to exclude. And exclusion is best related to both community standard setting and participation in the processes by which it is made effective.

Grand Jury Hearings: Useful Hybrid

In its formative period the grand jury was both a law-making and a finger-pointing agency in the search for lawbreakers. It was a means of clarifying the meaning of laws in a time of cultural confusion following the

Norman conquest. In the clustered concentrations of the poor a problem of cultural meaning is again a basic problem of government. This time the problem is not national. It is not local as local is measured in political dimensions. It is local in the neighborhood or community sense. In the neighborhoods where code enforcement has greatest meaning the absence of cultural understandings is an inhibitor and also an inhibitor in determining criminal intent.

There is need for process or mechanism through which cultural unity can be fostered. This movement seemingly is most likely to achieve success if it is keyed to a combination of academic instruction and actual participation. It is in this perspective that a proposal is made to introduce a revival of the grand jury principle. In contemplating the combination of education and participation it should be remembered that not everybody was eligible for grand jury duty when the grand jury process was laying the groundwork for what has become the common law. The membership was selective and represented the qualified leadership of communities. The same principle is proposed. The selection of grand jury members is proposed to be at large or by chance from a pool of qualified persons. Qualification is based upon successful completion of special courses.[8]

The grand jury-type function is too well adapted to the educational participation needs of the areas of concentrated and partially alienated poor to be overlooked. With this in mind, it is proposed that it be made a functional element in the neighborhood equity court system. The jurisdictional areas of such courts are keyed to district or categories at least as carefully structured as workable program ''neighborhoods.'' Emphases in development can at present best be focused through model city projects, although this is not intended to mean that either the neighborhood equity court, or its grand jury process of coordinating neighborhoods with unified compliance programs, is conceptually identified with model city areas per se.

The experimental grand jury need not consist of 24 persons, although the number 12 would seem most likely to provide instruction in the nature of the function. It is not considered that the process does more than provide what might be called an ''indictment for code violation.'' It would not change the compliance code hearing from being a trial de novo. It would not change the presumption of innocence. The term of membership would be short enough to ensure participation and encourage enrollment in related classes. The present inadequacy of housing codes in defining the responsibilities of landlords, tenants, and owner-occupants would have to be overcome, and in overcoming this inadequacy the rule-making authority should be citywide and involve a separate function. The grand jury hearing should be administered under the guidance of the neighborhood court judge, but its officials can be neighborhood people insofar as possible. Its findings would be reported to the clerk of the compliance court if it is considered part of an integrated arrangement. The essential function, participation based upon demonstrated acquisition of understanding, reaching an accusatory conclusion without shifting the presumption of innocence, and reaching consensus under guidance of a chairman-type local officer concerning the meaning of code infractions, is not necessarily tied to any other aspect of the neighborhood participatory system. Needless to say, the consideration of cases involving landlord-tenant relations would require equal representation from both categories. The neighborhood area should be large enough to rule out as participants members who are from buildings in which issues are presented for consideration. Owner-occupants should be considered ''neutrals.''

Tool Kit for Neighborhood Democracy

Three dominant findings have controlled the direction of the analytical attempt to find ways of overcoming the deficiencies in housing code administration. These are: (1) undue reliance upon criminal definitions and administrative processes dependent upon them; (2) failure to recognize that the dwelling unit must be considered in context with environmental factors not now within purview of an integrated regulative system; and (3) failure of the administrative systems to realize the basic educational potential possible through participation in developing reciprocal and mutual responsibilities. Attention is here turned to the summarization of the interrelated elements directed at the third and most important finding in this analysis.

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[8] It is suggested that OEO or the Office of Education, possibly with funds from the Department of Justice, become involved.

Five elements share roles in creating an approach that will provide foundation for education and continuation of educational processes. Active participation through which the underprivileged can learn the ways of democratic government and the inherent complexities of high-density living conditions with resultant necessity of reciprocal personal and family responsibilities is essential. The five elements are not subject to being rank ordered. Each contributes something different from the other four. None of the five can be explicitly determined; all are suggestions that can be particularized only in relation to the explicit factual circumstances of local condition and opportunities. But they point a direction that is oriented differently from that now in dominant use and that is considered inadequate.

To summarize: (1) The use of the grand jury-type involvement of people who have demonstrated interest and concern for community or neighborhood well-being is a basic revival of an institutional emphasis that once served to reduce friction when cultural conflict threatened stability. (2) The use of the compliance hearing places preliminary decision in professional hands at the stage in the process of enforcement in which the expertness of the staff can be integrated into decision making. It is important to recognize that the two elements, the grand jury initiation and the compliance hearing together eliminate the need for and the use of the amateur review body now in general use. (3) The neighborhood equity court, again with professional judicial officials, makes a basic shift away from reliance upon the criminal penalty and gives deeper meaning to understanding of reciprocal dependency through use of tort and contract elements in the legal tradition. Again the measure is educational, and basic appreciation of how our governmental system works through participation in processes that have been denied to the disadvantaged whether they come from rural areas or have been dispirited by our welfare programs. (4) The rule-making system within the local unit can provide experience in participation and encourage local organization. As explained, it can be escalated to provide neighborhood standards and use the neighborhood courts as experience permits. (5) And finally it is considered important that the reduction of emphasis upon compulsory inspection can be achieved through the development of licensing processes for rental housing, particularly low-rental housing, and that this development will open doors to more mature housing resource understanding and better social and total planning. The ultimate success of the approach, however, must involve reconsideration of the use of subsidies to allow development of housing policies within a framework of fundamental justice.

The "tool kit" will, of course, require a new assemblage of expertness and bring the relative isolation of housing code administration to an end. Once the machinery is geared to the complexity of its mission, the problem of landlord economics and tenant social dilemmas will be brought into focus. Hardship will not be left to obscure post-administrative processes but will be incorporated into the range of functional expertness of the administration. The basic need for the skills of architects, estimators, packagers, contractors, lawyers, appraisers, and social workers will become even more apparent to reinforce and expand the basic health and safety factors. No "local" code administration can afford all these experts; not even New York City, as now structured. This will force the development of larger administrative units. The greatest impact, in the years ahead, will be revitalization of the role of states. The brazen repudiation by HUD of the federalistic principle will turn out to be the key to revitalization of traditional federalism. There will be a shift of power to those agencies, particularly in Washington, that have both the experienced personnel and the resources in depth to facilitate human needs through environmental factors. An immediate need, and one that is overdue, is the development of a university research and teaching center in which the personnel to manage and administer the emerging new order will be generated. No existing public administration training and research program sufficiently covers the range; the one in the offing will include medical and legal expertness as has not been attempted in the past.

Chapter 16

CRITERIA AND SANCTIONS

The distinction between a regulative system emphasizing ''performance'' as distinguished from ''specification'' standards has been given a considerable role in the approach to building, housing, and other codes. Much of this argumentative consideration has assumed that there is a choice. More mature examination of the the administrative process indicates that separate functions are present in each category. The basic problem is to find a system that uses the best contributions from both functions and welds the product into an effective and dynamic programmatic attack upon housing poorer than the affluence and moral values of a society can afford.

Performance standards are criteria indicating direction and objectives of programs. As such they must lack specificity and use language symbols that express idealized purposes. These purposes do not change very much over periods of time expressed in years. What changes are the physical structures and surrounding environments in which the performance standards have meaning. Moreover, the technological, moral, and political values change, reflecting component factors that are beyond easy recognition. The objectives evidenced in the earliest legislative approaches to better housing still constitute the idealized performance standards of today to a marked degree.

Specification standards are essential to illuminate the extent to which performance standards can be given functional meaning in a given time and place. They are statements of particularities, for example, how much space is considered valid per human habitant; the specification standard will talk in terms of square and cubic feet, but the performance standard can hold firm by reliance upon the terms ''adequate'' and ''reasonable.'' How the footage here and now is determined, however, will depend upon the interaction of a variety of forces. There will be the meager but potential knowledge of health-oriented environmentalists. Some will consider that this is the central factor. But there are other factors: How much can be afforded by families on ''welfare'' for housing? How much is to be accorded to availability of space in places such as institutionalized public housing or mobile homes as alternative locations? How much ''choice'' is to be given the tenant in regard to where he lives? How much money to build and own his own home can the low- or middle-income tenant obtain? As the extensive ramifications of the relationship between the ideal and the attainable are examined, realization comes that specifications in a changing world would become static and unacceptable without the directions toward dynamic goals. The performance standards can well be considered the ever-shifting goals. Together they constitute the foundations upon which an administrative system can be built.

The American system is ''federal.'' This means that allocation of function and resources presumes a significant role for three levels, and sometimes for intermediate levels, of government. It means that national standards can be determined in terms of national political consensus but that these determinations should be made with recognition that the state and local governments exist and have appropriate roles. There is ample opportunity to make effective use of the federal principle in housing code administration. This is not being done

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at the present time for a number of reasons. Some of these are that the response to political pressures in Washington is not the same as the composite pressures registered in the state and local governments; the possibility of technical competence is greater in the central government, although this is curtailed by distribution of expertness among administrative agencies; and thirdly, the tax system gives the central government first grasp. This is justified on the theory that the central government equalizes facilities through distribution of centrally collected taxes. Since the plight of the cities has become public concern at a late date in the evolution of the system, the dependency of local governments upon central government has become extraordinarily great. This has resulted in a tendency of the central government, and particularly its administrators, not only to deal directly with local governments but also to impose particularized conditions upon them that stifle local initiative and subvert local political sensitivities. This tendency is evidenced when HUD considers it within its province to require that all dwelling units have full bathrooms or that no central kitchen facilities be permitted in certain categories of rooming house facilities.

Federalism leaves the foundations of power to regulate personal and property rights in the several states. States, with more restricted taxing power than the Federal Government, and for reasons of different representation responses and overly frozen administrative structures, have not responded to the highly vocal pressures of liberals and of city politicians dependent upon the rising minority voices in urban elections. But it is in the states that coordination of policies in terms of distribution among state administrative agencies and delegation to local governments exists. State governments cannot be bypassed without disruptive effects that are in conflict with our deeper traditional values.

What is the relation between federalism and code enforcement?

At the apex, properly concerned with congressionally agreed-upon national uniformities of policy, is the role of national administration. It is here that resources can be posited and distributed, upon which the equalitarian principle is given operation and in which the limited resources of more local governments can be implemented. National hopes and ideals should promote the development of guidelines to see that the ends of Congress are achievable but always conditioned by the realization that the system is federal. It is the mission of national administration to see that policies are clear and reflect congressional intent, that the optimum resources of technological understanding are brought to bear, and that these factors are sufficiently developed into general or performance standards. The distribution of grants is the sanction through which compliance is expected to be registered. The American system, as yet, considers these matters ''political'' and beyond ''judicial'' remodeling.

It is in the states that the guidelines and distributed resources emanating from Washington can be activated and coordinated into operating systems in accordance with state differentials. It is in the states that the distribution among administrative agencies and the delegation of powers to local agencies must take place if state government is to be viable. This applies to housing codes as well as to other aspects of government. The states have not evidenced the degree of responsibility necessary to convince their urban electorates that they play their part well. And there is nothing to prevent this electorate from appealing directly to Washington.

There are no ''models'' that can fit 50 different states; the differences are too great. But in housing regulation it must be emphasized that over half a century ago the leadership toward improvement of housing was in the states in which pressures developed from city leadership. This leadership has turned, or is turning, toward Washington. There is a clear role for state action: Find meaningful expression and operational systems to give meaning to the thrusts coming from Washington, develop state-local relationships and structures to combine statewide performance-type minimum standards and guidelines, and delegate responsibilities to local authorities to create and sustain ''specification'' definitions and applications of the general expectancies. At present, however, this question seems appropriate: Can the states regain their functional role in housing regulation in America, or will the political expectancies evidenced at the national level find expression in congressional action to expand direct federal-local policy controls? A corollary question is equally important: Can the national government forbear the ''specification'' type of interference in local authority that is essential to local responsibility?

Cities and other local code administrative units are undertaking code and other regulative processes concerned with housing standards without adequate linkage to the ''higher'' governments. They are expected to produce both performance and specification aspects of control without adequate resources. Most such units are inherently too small and poor to approach the complexities in such programs. The greatest deficiency is in the state legislation. It provides neither sufficient guidance to permit the attainment of balanced justice nor technical help where such help is desperately needed. States have largely withdrawn from the field as their internal bureaucracies have indulged in arguments about where the function belongs or whether it is closer to one or another existing department, when in fact state administrative structures, with a small number of exceptions, are not geared to the problem at all if effectiveness is a criterion.

The English Government, with a less complex system, evidences a much clearer grasp of the problem of inter-governmental responsibilities than does the American. For the American system a dominant role in formulating the scope of national uniformities, the development of research, and the interpretation of application of findings has been suggested. The application of such findings, in the framework of respect for national uniformities, and the addition of such conditions as find support in the political apparatus of states, undeveloped at present, is proposed. In Britain this double phasing of establishment of basic standards, emphasizing general or performance-type format, with necessary guidelines, is performed in the Minister of Housing and Local Government under the guidance of and with delegated powers from Parliament. With this observation, the effect upon local government in both the American and the British system can be recognized as having much in common when dealing with central authority.

Both systems recognize the dependency relation under which local authority is exercised. A recent white paper issued by the Ministry of Housing and Local Government states what might well be considered a policy ambition of both countries: ''No local authority can do everything on its own, but the Government envisages that the improvement of the older housing areas in our towns and cities should be carried out under the leadership of local authorities, and following general strategies which each local authority will decide for its own area.''[1]

British insights have long since recognized the relationship between demolition programs and housing needs, and they approach the problems as unified. The preservation of usable and rehabilitable housing is a commitment, and the basic approach is through grants for such building owners. But programs are not dictated from the Ministry of Housing and Local Government. The white paper states:

> The proposals of this paper place great emphasis on flexibility: flexibility in conditions, in grant maxima, in Ministerial control. And this is right, since local circumstances will vary very widely. Some authorities will need to continue to devote most of their energies to clearance areas. Others, where there are not so many slums, or not such a shortage of housing,

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[1] *Old Houses into New Homes*, a White Paper presented to Parliament by the Minister of Housing and Local Government and the Secretary of State for Wales by Command of Her Majesty, April 1968. The quotation is from the conclusions, paragraph 53, p. 11.

> or a higher proportion of sound old houses, will wish to put much greater emphasis on General Improvement Areas.[2]

The English approach in rehabilitation of existing housing has developed two elements that could be favorably considered in an attempt at improving the American approach. The first of these relates to the clearer recognition of the role of ''performance'' standards and the development of these standards as a ''higher'' governmental responsibility and the resultant recognition of a role of local government in application of more detailed or ''specification'' standards to accommodate local situations. The second element in the English approach is local application of centrally determined subsidy programs that recognize the obvious facts that landlords cannot be expected to meet escalating costs with relatively fixed rental incomes. The English system has, furthermore, recognized that the protection of existing low-rental housing can be better approached through what we call eminent domain purchase rather than through inevitable deterioration in noneconomic situations with eventual demolition under the police power concept. Some explanation of these matters, in the order of their consideration, will be attempted.

In 1966 a study ''Older Homes: A Call for Action'' was made for the Ministry of Housing and Local Government. This report was made by a committee appointed ''to consider the practibility of specifying objective criteria for the purpose of slum clearance, rectification of disrepair and other housing powers relating to minimum tolerable standards of housing accommodation.''[3] Quite in contrast with an American approach, this committee undertook its analysis with focus upon the improvement of conditions surrounding the payment of grants under the Housing Acts of 1958. Grant payments, rather than violations leading to penalty, become in English practice the basic pattern of what we call ''performance'' standards. The committee concluded as a first determination that 12 factors were involved in basic standard setting. The language in which this 12-point standard is formulated illuminates the utility and difficulty in performance definitions:

> It provides that a dwelling must:
>
> (a) be in a good state of repair and substantially free from damp
> (b) have each room properly lighted and ventilated
> (c) have an adequate supply of wholesome water laid on inside the dwelling
> (d) be provided with efficient and adequate means of supplying hot water for domestic purposes
> (e) have an internal water closet, if practicable, otherwise a readily accessible outside water closet
> (f) have a fixed bath or shower in a bathroom
> (g) be provided with a sink or sinks, and with suitable arrangements for the disposal of waste water
> (h) have a proper drainage system
> (i) be provided in each room with adequate points for gas or electric lighting (where reasonably available)
> (j) be provided with adequate facilities for heating
> (k) have satisfactory facilities for storing, preparing and cooking food, and
> (l) have proper provision for storing fuel (where required)[4]

A significant number of local authorities responsible for housing controls in Britain are also responsible for general land use planning. As in this country, housing is located in situations in which livability has been reduced by resultant conditions that reflect inadequate general planning. The committee took cognizance of this situation. It recommended supplementation of the existing standards with 18 new ones. The first of these was:

> ''(a) That the environmental conditions must be satisfactory.''[5]

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[2] Ibid., paragraph 56, p. 12.

[3] *Our Older Homes: A Call For Action*, Report of the Subcommittee on Standards of Housing Fitness, Ministry of Housing and Local Government, London: 1966, p. 1.

[4] Ibid., p. 11.

[5] Ibid., p. 13.

The committee further considered the problem in exploring what are classed as Minimum Fitness Standards. Since the matters involved are pressing for consideration in so many American cities the proposal is quoted:

> Environmental conditions are as relevant to questions about fitness for habitation as they are to the satisfactory dwelling. We recognise that the Housing Act 1957 requires the local authority to consider whether demolition is the best method of dealing with houses in a proposed clearance area. The relevant part of Section 42(1) provides:
>
> ''Where a local authority upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district–
>
> (a) that the houses in that area are unfit for human habitation or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings if any, in that area are for a like reason dangerous or injurious to the health of the said inhabitants; and
>
> (b) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area;
>
> the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the subsequent provisions of this Part of this Act.''
>
> We think, however, that more emphasis needs to be placed on the effect of unsatisfactory environment on housing conditions. We have described conditions in which smells and noise were making living conditions intolerable. Dust, smoke, fumes and vibration can have similar effects. Clearly these are not matters for which the owners of the houses would normally have any responsibility. If, therefore, houses are to be cleared because conditions cannot be improved, compensation should not be affected, as it would be if the houses were declared unfit. We suggest that local authorities could be given power to clear the houses without adversely affecting the owners' compensation, by introducing into Section 42 of the Housing Act 1957 an additional ground on which houses, without being deemed to be unfit, may be included in a clearance area. This consideration might be that the houses are made unsuitable for occupation by the proximity of offensive or noisy processes. We would regard this as including excessive traffic noise.[6]

Note that the regulation of housing in the English view does not separate urban renewal and housing controls and that it proposes extension of what is already a clearly established use of payments for unsatisfactory housing instead of destruction of property rights. Equally important is that an effort is made to combine central generalities (performance) and local application of these general standards (specification). Some 18 new generalized standards, in addition to the one relative to environmental conditions, were proposed by the committee. Since no claim is made, nor implied, that these standards are based upon scientific determinants, it must be concluded that the thrust is toward a broader consensus on standards having nationwide validity.

The English system uses explanatory notes to guide local authorities about intended meaning of general or performance standards. One example will suffice to clarify the approach. A general standard for a satisfactory dwelling provides that it ''(c) be satisfactorily arranged internally.''[7] This is accompanied with a note intended to guide the local administration. ''The arrangement of the rooms, passages and staircases should not in any way constitute a hazard or cause serious inconvenience to the occupants. This implies convenient access to all habitable rooms and workrooms, stairs of a safe pitch, adequate landings, handrails where necessary, and any change in floor level clearly defined. A water closet directly off a living room or kitchen is not satisfactory.''[8] Carrying on from these performance guides is left to local discretionary action. In this study it falls primarily into the province of rule making.

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[6] Ibid., paragraphs 52 and 53, pp. 23, 24.

While the Canadian Government does not promulgate a housing code in the scope of a typical American document, it does provide regulations of a somewhat general nature applicable to home construction.

> The new Part 9 is the first of the sections of the Canadian Code to reach complete ''performance'' style. It deals with Housing. Relatively short, it yet covers all essential requirements of residential design and construction in performance terms, while giving enough specific clauses on absolutely vital features to enable a local building inspector to use it by itself for control of housing in his area. It is intended, however, to be used in association with one of the seven technical supplements to the Code which are also now available in revised form, two of them being entirely new.[9]

Note that these Canadian code standards are designed for adoption and supplementation by either provincial or local governments. There is much to recommend this approach, which combines elements of both the English and the American systems.

While it is not directly in point, the Canadian method of combining central guidance through a uniform code and local discretion may be worth noting. Our typical housing codes produce confusion between this and other codes because they are not part of a systematic pattern. It is possible for an American municipality to adopt a housing code or a building code, for example, independently one from the other. The consequence of this approach is that gaps and duplications appear that can be administratively overcome only through some coordinating control processes. In Canada this is unlikely to happen. The National Canadian Code covers both housing, but in a more limited scope, and other buildings. Part of the local guidance system is a tabular presentation of weather data for a listed 582 locations, ''which have been chosen for a variety of reasons. Incorporated cities and towns with populations of over 5,000 have been included unless they are close to other larger cities. For sparsely populated areas many smaller towns and villages have been listed.''[10] When performance standards relative to depth of foundations and insulation are involved, such information permits general standards to be given particular meanings. The example, concerned with temperatures and other weather factors, would be of particular importance to a building code but of basic importance to a housing code if no building code existed as a part of an overall housing standards system.

Similar observations can be made about fire code standards in the Canadian approach. Supplement No. 2 to the National Building Code provides guidance to local administrators, permitting them to develop local standards within the framework of the national system and rely on test data and fire prevention information and related materials. This approach would be particularly effective in American jurisdictions where balanced regulatory systems do not exist; it would provide more efficient administration if it were adopted on a national or even on a state-by-state basis.

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[7] Ibid., p. 13.

[8] Ibid., p. 14.

[9] Robert F. Legget, ''The National Building Code of Canada: A General Review,'' Technical Paper No. 220 of Division of Building Research, Ottawa, May, 1966, p. 5.

[10] Supplement No. 1 to the National Building Code of Canada; Climatic information for Building Design in Canada, 1965, p. 3.

The Canadian National Code includes performance standards and guidelines in Supplement No. 7 under the title "Building Standards for the Handicapped." Few American cities, through the combination of their various separate and usually uncoordinated codes and local regulations, can come near to the effective instruction to meet the problems involved in such standards. Nor is it recommended that every city having a housing code try to go through the expensive processes so obviously involved in the development of the Canadian Supplement, which makes local application within the capacity of reasonably competent inspectors and administrators.

A final observation relative to the Canadian system is that it uses what are considered to be local "good practice" standards. This permits the interplay of technical and political value systems with the qualification that the code itself is sufficiently comprehensive and sufficiently illuminated with "specification" examples and explanations to give reasonable assurance that basic safety and health standards will be imposed. It is considered in this study that there is more effective opportunity for meaningful adaptation to local situations within a framework of overall protection than the American system affords.

Following the same unblazed trail, and with something of the same stumbling that characterizes our approach to improvement of housing facilities, the British finally registered a clear realization that landlords could not be expected to operate housing properties at a loss. In 1965 a Rent Act was passed to coordinate an established subsidy system found necessary to bring older housing into compliance with escalated expectancies. Since it is the considered conclusion of this study that the same conditions exist in most American cities but that as yet we have not recognized the impact of these conditions upon housing code administration, some attention to the British experience seems warranted. A quotation from the recent white paper illuminates contemporary top-level thinking in the British government:

> Under present law where the improvement is aided by grant, the permissible rent increase is limited by the grant conditions. Now that there is a well-established system of determining fair rents for regulated tenancies, it seems right to use this machinery for determining new rents of these tenancies following grant-aided improvement. ... The rents chargeable, even with the increase permitted after improvement, do not normally provide a sufficient return to encourage landlords to improve their houses. Indeed, landlords whose rents are still controlled may have little incentive, or may even be unable, to maintain their houses as they should. ... But the achievement and maintenance of a proper standard of equipment and repair would be such an advantage, and the Government accordingly propose the following changes in the rent law.[11]

The changes proposed include a graduated subsidy rent payment system over a time period. Of importance is the extension of such subsidies to situations in which no grant for constructional changes have been given. The subsidy rent payments are conditioned by approval of the local authority of completion of the work. The reliance upon the responsibility of the local authority to accommodate such a difficult task is further amplified by the comment that "The question of rights of appeal where a certificate (for 'fair rent') is refused is being further considered."[12] Housing matters, generally involving decisions of local authorities, in British practice are sometimes appealable to higher administrative authorities and extended to courts at the discretion of the political authorities.

The operation of the system is illuminated by what appears to be somewhat special conditions in the city of Leeds. In June 1966, the city had determined 61 improvement areas comprising 10,998 houses,

[11] Supra, p. 7.

[12] Ibid., p. 8.

approximately 90 percent of which were single-family, back-to-back dwelling units. In the improvement areas a finding had been made that the houses were basically structurally sound. When improved they are reported to be in great demand for letting. This program of area improvement is closely coordinated with slum clearance. The programs are under the jurisdiction of supervisory public health inspectors. Slum clearance has been proceeding at a rate of some 2,300 houses a year, and house improvement has been ''so accelerated that one fresh improvement area of approximately 200 houses is declared each month.''[13]

The Leeds system is proceeding without compulsion against owners or landlords, in the sense that the word is used in America. ''Their policy has not involved the use of any special legislation beyond that generally available in relation to discretionary and standard grants and powers to purchase houses contained in Part V of the Housing Act 1957. Although the Housing Act 1964 now provides power for the declaration of compulsory improvement areas Leeds has continued to rely on the older powers.''[14]

The operational approach of Leeds is clearly communicated by presentation of two model letters designed to be sent to property owners in improvement areas. The first letter follows a visitation by a public health inspector. He makes a return of information relative to address; ownership; type of house; rent; sex, age, and relationship of occupants; number and type of rooms; and existing amenities and facilities. Note that the letter is sent from the town clerk's office and that it is friendly and completely devoid of threat.

Model Letter 1

Town Clerk's Office
Civic Hall
LEEDS 1

Dear

The Housing Committee of the City Council have instructed me to write to you about the above property.

The Council are proceeding with their slum clearance programme as fast as circumstances permit but in addition to the houses with which they will be dealing under the slum clearance programme within the next ten years or so there are in the City a number of reasonably well-built through terrace houses which are without full amenities and which fall below modern standards.

All the houses in the above mentioned area are capable of independent individual improvement and the improvement of one house is in no way dependent upon the simultaneous improvement of the houses on either side.

The Council are most anxious that houses of the type comprised in this area should be improved and as they are of the opinion that the property which you own in the area comes within this class, I have been instructed to ask you to consider the improvement of your property. There are very generous grants available to assist owners to improve their houses. Briefly, however, the assistance available is as follows:

1. They are able to give discretionary improvement Grants for works of improvement if they are satisfied that they will bring the house up to the standards laid down. The grant is for half the cost of the works and is limited to cases where the cost is not less than £100 and where it does not exceed £800.
2. There is another type of grant known as a Standard Grant which an owner is entitled to as of right. The grant is for a sum equal to half the cost incurred in carrying out the works required to provide the standard amenities in the house, subject to a maximum grant of £155. This grant can be used to cover the cost of installation of certain amenities even if the total cost of the work is less than £100. The usual works of improvement are the provision of a bath and wash basin, hot water, an internal water closet, proper food storage and in some cases a dormer window in the attic.
3. The Council will lend you the part of the cost which remains to be borne by you after the payment of the im-

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[13] *Our Older Homes*, Appendix 4: Housing Improvement in Leeds, p. 52.

[14] Ibid., p. 52.

provement grant and if you decide to to do the work without an improvement grant, they may lend you the whole or a part of the total cost. They will, of course, only make a loan if they are satisfied with the security which you offer.

4. The most practical form of improvement will in most cases be the conversion of a small bedroom into a bathroom and w.c. and the provision of an improved bedroom in the attic. If this will lead to overcrowding the Housing Department may be able to assist and it is suggested that you should consult the Director of Housing, Buckingham House, 41, Headingly Lane, Leeds 6.

If you should not wish to improve the property yourself, then the Council will be prepared to purchase the same from you in order that they may improve it and will pay your proper legal and surveyor's costs in respect of the transaction provided the matter proceeds to completion. If you adopt this course, the Council will be prepared to provide alternative accommodation, if requested.

I feel that I should emphasize that the Council attach the utmost importance to securing the improvement of all the houses in the area and they have in the past found it necessary, in the absence of special circumstances, to seek compulsory powers to acquire houses so that they may be improved where the owners have not been willing to secure the improvement of the house in one of the ways mentioned above.

The Chief Public Health Inspector (Market Buildings, Vicar Lane, Leeds 1) will be pleased to advise you as to what works of improvement are needed and would be eligible for grant. It is essential that any works of improvement should be approved by the Council for grant before they are carried out, otherwise they will not subsequently rank for grant and if, therefore, you wish to consider improving the property yourself you should make a preliminary application to the Medical Officer of Health (Chief Public Health Inspector), Market Buildings, Vicar Lane, Leeds 1.

In view of the importance which the Council attaches to this matter I shall be grateful if, as soon as possible, you will let me know your decision by completing the enclosed form and returning it to me in the stamped addressed envelop which is also enclosed.

Should there be any point upon which you are not clear, no doubt you will let me know and I will endeavor to give you every assistance or if the point relates to the actual works needed the Chief Public Health Inspector will also be prepared to assist you if you will communicate with him.

I also enclose a copy of the Ministry of Housing and Local Government booklet ''House Improvement Grants'' for your use.

Yours faithfully,

When replies are received, the chief public health inspector and staff visit the owners—or agents—and discuss the needed improvements. ''They give verbal indications of the likely cost of necessary works and impress on the owner or his agent the desirability for improvement to the 12 point standard on which discretionary grant is payable.''[16] They have found that initial objections of an owner are usually due to incomplete understanding of the improvement grant scheme and lack of realization that he can obtain a loan from the council for the remainder of the cost. The council undertakes to rehouse occupants while the work is in progress if it is necessary.

If there is no response to Letter No. 1 a second letter is sent. This is over the signature of the chief public health inspector. It is reproduced below:

Model Letter 2

Public Health Department Annexe
12 Market Buildings
Vicar Lane
LEEDS 1

Dear Sir,

I write to ask you to consider once again making improvements to your property with the aid of an Improvement

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[15] Ibid., pp. 52-54.

[16] Ibid., p. 50.

Grant. As you are no doubt aware, the Corporation have been trying to secure the improvement of the houses in this area. Many owners have taken advantage of the scheme and have already improved their property or are in the process of doing so.

The grant which is available to you is a free gift of one half of the total cost of the reasonable necessary works, which I am sure you will agree is a big incentive to owners to modernize their property. The remainder of the money, up to the full estimated cost of the necessary works, may be borrowed on loan from the Corporation at the usual rates of interest.

As an alternative, the Corporation are willing to purchase your property and carry out the works of improvement themselves.

If these proposals are still unacceptable to you, I am bound to inform you that the Corporation may eventually consider the making of a Compulsory Purchase Order in respect of those properties in this Area which have not been improved. However, should you now agree to carry out improvements, I should be pleased if you would complete and return to me the enclosed postcard so that I may commence the grant procedure.

Should you require any further information I should be pleased to arrange an interview during normal office hours, either at this office or at your property.

Yours faithfully,

Chief Public Health Inspector.[17]

This is not the complete story. There is special concern for hardship cases. Since the landlord is able to raise rents to bring the building into compliance, in cases of long-term lease, or where owner-occupants find increased payments an undue hardship, the system provides: ''After the houses have been acquired by the Corporation, have been improved by the Director of Works and handed over to the Director of Housing, a rent rebate scheme is operated where tenants suffer hardship by the increased rents. If there is hardship in the case of old age pensioners, it is found that the National Assistance Board are most helpful.''[18] The basic purpose behind this broad program is to prevent deterioration in the housing supply as well as maintain adequate housing resources. Even so, the percentage of houses taken under what we call ''eminent domain'' has been a small minority of cases. ''This'' the report states,'' is because owners and agents in the City now fully appreciate the desirability of such comprehensive improvement and welcome the measure of security for their property which such action confers.''[19]

The author would suggest that the city council of New York City make a first-hand tour of Brownsville and then make a trip as a body to Leeds and spend a few days in the improvement areas.

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[17] Ibid., p. 55.

[18] Ibid., p. 52.

[19] Ibid.

Chapter 17

FINDINGS, OBSERVATIONS AND RECOMMENDATIONS

A. Expertness and Responsibility in Housing Regulation

1. PUBLIC HEALTH AND HOUSING CODES

Public health administration has been distinguished in balancing education, persuasion and coercive processes. It has recognized that citizen acceptance of values is often more important than that such values be based upon demonstrable scientific proof. The APHA-PHS code, especially in the hands of non-health trained officials, easily escapes the public health tradition. Such codes require selective enforcement or relaxation of provisions as public support is nurtured. This quality in enforcement is necessarily based upon expert appraisal and evaluation of impact in terms of health and safety.

HUD has taken the tack that it is immaterial what agency acts to administer housing codes, and that all provisions must be indiscriminately enforced. This has made the administrative process essentially a police function, and not only eliminated the need for public health expertness, but placed burdens upon administrators to obtain compliance with provisions that are little understood and often unsupported. To this inherently difficult situation must be added the fact that many, if not most, provisions in housing codes are not based upon demonstrable health criteria; many provisions are essentially matters of comfort, morality, or convenience and amenities. These are hopefully acceptable as restraints on private property rights in order to reduce the differential between housing facilities available to the poor and those facilities considered appropriate to more affluent families. This approach not only minimizes the base of such codes in traditional police power and ignores the difference in seriousness of violations, but also places burdens retroactively on owner-occupants and landlords without regard to ''ability to pay''.

Obviously the issues involved in housing codes exceed the recognized expertness of public administrators. The solid core of regulative power, however, is developed from competence more nearly identifiable with professional health officials, ranging over medical, mental health, safety and sanitary engineering.

2. IMPLEMENTATION: RELATED EXPERTNESS

Historic responsibilities of local governments have been based upon curbing nuisance or nuisance-like conditions relative to housing occupancy and use. In the final analysis the validity, or enforceability of housing code provisions, is a matter of judicial responsibility. Housing code administration has been, unfortunately, presumed to be a simple process of discovering violations and imposing criminal penalties upon owner-occupants or landlords that fail to comply with administrative demands.

But this simplistic view is inadequate. Compliance costs money in most cases, and officials have both authority and duty to order demolition or boarding-up when costs transcend simple formula percentages of values. To make such determinations involves expertness present in few, if any, smaller cities.

To avoid the messy problems of allocating responsibilities between landlords and tenants, codes are prone to unduly burden owners and practically license tenant irresponsibility. There is a latent but unexplored need for expert allocation of responsibilities. There is also unsatisfactory consideration of the capacity of owners to meet retroactively imposed costs and still make a reasonable profit through prudent management.

Although some problems can be faced and improved without change in legislation, the most important problems are outside of this approach. They stem from inadequate legislative guidance and from lack of identification of the issues involved. Legislative bodies are not expert in coordinating desired results with competent combinations of discretion and guidance in the use of methods. The assumption that such matters are unimportant is more compatible with the philosophy of Jacksonian days than with this century.

Both state statutes and local ordinances evidence little understanding of the complexities confronting code administrators. Deficiencies are most noticeable (1) in relation to providing resources and the time necessary for educational processes in order to develop a tolerant and supporting citizenry; (2) in respect to the role and methods of rule-making, and provision for necessary staff expertness; and (3) in the enforcement processes, so that housing code records that are available to legal counsel and to courts will support a presumption of validity in the administrative determination.

Few housing code administrators have resources that are related to the complexity of the problem of developing a favorable climate of understanding and support. One of the most puzzling issues in regulatory administration is the transition from persuasion to compulsion, and the effective use of relaxing powers. Little attention has been given this problem in the history and operation of most housing code systems. The problem has constitutional importance; administrators, or their inspectors, are expected to plunge directly into a highly provocative intrusion into domestic privacy. Americans would not be worthy of their heritage if such action was condoned.

The training of housing code administrative staff is usually focused upon those who need it least: inspectors. Following specification-type provisions they can overwhelm their superiors with findings of noncompliance. One of the common problems in housing code administration is that too many violations are found relative to the capacity for effective disposition. Complexities develop when inspector's reports are turned in. It is at these levels that training is most needed and least likely to occur. When code enforcement is not found to be satisfactory by Washington, the tendency has been all too often to provide money for more inspections.

The premise that housing code administration provides a simple supply of cases to be prosecuted in courts reduces the need for expertness to the level that it could be performed as an adjunct of the public prosecutor's office, or added to the functions of a police department. The underpinning of administration based upon this premise is inadequate. Solution of interrelated economic, health, educational, social and welfare issues in the context of a dynamic governmental system cannot be achieved through considering each a separate and independent element. Commentary is here centered upon agencies and functions that are ''normal'' in American city or urban government. The greatest defect in housing code administration is the premise upon which it is constructed. Until the related basic issues can be considered in their eclectic and/or perspectives, housing code administration will fail in its mission to an intolerable extent. Few, if any, subjects in this country are more in need of effective program planning.

Beyond these matters is the fact that code administrators must face difficult legal problems of entry, development and operation of hearing systems, and development of records to sustain court action. Except for an almost insignificant minority, code administrators lack adequate legal expert counselors.

Legal counsel seems best when made independent from the city attorney or solicitor and directly associated with the responsibilities of the housing administrator: the other ancillary experts need to be available, but not necessarily as staff personnel of the housing code office.

3. PROBLEMS IN AREA AND HIERARCHY

The APHA-PHS code was designed with urban high density areas as its target area. It is a tool to bring old dwelling units into conformity with more restrictive conditions and to assure such conditions in new and remodeled units. What may be considered minimum or optimum regulations in such circumstances is not necessarily valid criteria for low-density areas, and will give political dissatisfaction in many if not all rural areas.

There is need for gradation in standards that is related to surrounding environment, and the economic abilities of residents. The APHA-PHS code needs adaptation to these conditions and probably in terms of categorical similarities and differences. This is a composite problem in evaluation of the importance of particular regulations in terms of health or other objectives, and a systematic appraisal of citizen acceptability and support attitudes, and resources. It involves rethinking the role of subsidies in economically disadvantaged areas: the keying of codes to police power is insufficient, and burdens imposed retroactively must be assumed—in some situations—as a public cost.

The code administration unit must be able to support essential composite expertness. This aspect of responsible availability of expertness may well prove important to inter-unit contracting, experimental larger "regional" units, or hierarchical development of coordinated state-centered resources. Little, if any, significant development existed until recently in state-local coordinated action, and the subject deserves more attention.

B. Administrative Organization and Procedures

4. INDIVIDUAL VS. SOCIAL JUSTICE: TENANTS, LANDLORDS, AND OWNER-OCCUPANTS

Housing code administration is an interrelated combination of class or categorical legislation and a penalty system designed to obtain individual justice. The attempt to provide improved living conditions for the poor is sought through a program placing economic burdens on owners, with inadequate determination of compatibility with owner economic status.

Some more effective method is needed to deal with the plea of hardship on the part of owners. Some more competent way must be found to distribute responsibility for violations between landlords and tenants. Housing code administration must not become a thrust toward improved living conditions without mutual responsibilities fairly determined within the administrative processes.

5. ADMINISTRATIVE PROCESSES AND PRESUMPTIVE VALIDITY

A measure of success of any regulative system in administration is its ability to reach determinative decisions, so that they will be given credence in cases of court review. The establishment of a firm presumption of validity is not possible under the procedures and record keeping methods of typical housing code administrations.

The use of administrative pre-hearing and hearing sequences to establish factual conditions in which violators can be held accountable, with direct consideration of the hardship issue and the relative accountability of owner-occupants, landlords and tenants is quite underdeveloped in most administrative units. The records developed in existing procedures do not suffice to indicate full consideration of the issues. If favorable action is to be expected when cases are taken before courts, the record should disclose that the accused or defendant has been given reasonable knowledge of the charges against him, or of his housing responsibilities, and that he has had opportunity to explain his position, that the case against him is based in fact, and that his intent to commit, an illegal act, by commission or omission, has been established. At present, these basic elements are not well institutionalized in the majority of administrative systems. There is a noticeable failure to balance education, pre-hearing processes, and formalized administrative hearings with a purpose of perfecting accusatory records.

6. PROSECUTORS, COURTS AND PENALTIES

No other single element presents more confusion than the typical housing code reliance upon criminal penalties. The problem is acute and related to basic premises in our legal system. No man should be punished unless he has wilfully violated a law which he can reasonably be expected to understand. This element is not accomodated in many, if not most, housing code violations. It is difficult to demonstrate that violations are against reasonable standards. This is especially true when a building has continued in a use pattern that was legal before the code was enacted, and when no demonstrable proof is possible that health or safety issues are involved.

If housing code violators were tried before juries the incidence of conviction would be influenced by the common attitude toward the offense and the offender. Even when juries are dispensed with, prosecutors and judges reflect the values of electorates to which they are accountable. This is a protective device against tyranny, and is not to be lightly bypassed.

The issue is such that the addition of funds to seek more effective enforcement through more penalty assessments may have unfortunate effects. The cleavage upon which support is dependent may be deepened and the program fall farther into disrepute. There is a clear responsibility to limit penalty enforcement to situations in which widespread citizen support has been established. This is true even to the point that new timetables may be essential.

The situation is aggravated by the realization that standards are imposed ''from Washington'' and that they are the end result of administrative exercise of but slightly-guided Congressional legislation.

7. COORDINATION OF SERVICES AND REGULATIVE PROGRAMS

Two types of problems exist under this heading. The first relates to the interrelationships of regulative programs that directly affect housing. The second involves the interrelationships between housing code administration and other programs that collaterally relate to housing problems.

Housing codes center focus upon occupancy and use. Usefulness of housing often involves physical modification, repair or reconstruction. The expertness to guide and approve these operations are usually in building code specialized staff and administrators. Sometimes the violation of an occupancy standard requires fire prevention expert consideration; others relate to health or zoning. The creation of smoothly working relations between these units often gives difficulty and creates confusion.

For instance, an intensification of housing code inspections may overload the plumbing inspectional system or some other unit, and often places burdens on corporation or city attorneys beyond budget appropriations. Examples can be illustrative of different patterns of cooperative action, but insistence from Washington upon more ''effective'' code administration may have unexpected ramifications.

Regulative programs, distributed among relatively independent agencies, do not automatically coordinate. Most local jurisdictions, presided over by short-term elected officials, have neither the knowhow nor administrative talent to achieve effective coordination. Washington influence and the dynamic succession of policy and personnel changes at the Federal level are growing beyond local accommodation. Dependency upon outside consultants may add as much confusion as understanding; this is something of a dead-end road if local democratic responsibility is to be maintained. Better communication systems or more systematic description of methods of attack upon mutual problems are sorely needed. It also seems inevitable that better guidance and policy illumination from central, i.e., State and Federal, governments must be provided one way or another.

An example of the difficulties inherent in basically separated programs is found in the relationship of housing codes to zoning regulations. There is no doubt but that dwelling units must be considered as part of an integral problem of environmental management of the human ecosystem. Housing codes, however, have moved toward inflexible specification-type provisions. This is probably because of an inherent lack of qualified experts to do what housing codes have as their mission. But land-use planning has supported the development of expertise in zoning that has made zoning anything but static.

Consider the development in land-use planning in the category called ''planned unit developments''. Traditional use of zoning defines areas in terms of relatively gross uses, such as industrial, commercial or residential. Experience increases categories and sharpens definitions. But new patterns emerge, and one noticeable outgrowth is the ''planned unit development''. Under this category, the ratio of lot to dwelling unit size is changed in favor of more areas for common purposes. These may be playgrounds or recreational areas or simply green belts. The environment may be more liveable and less monotonous by considering the total development rather than seeking to control the units as separate elements. This type of perspective comes close to conceiving the dwelling unit as a part of a wider environment.

That type of approach can be further developed. In New Jersey, 1967 legislation delegated to local planning agencies, responsibility for creating a healthful environment, relief from traffic congestion, and regulation of densities and overcrowding-in the general welfare. Such delegations must be developed into explicit rules through a sub-legislative or rule-making process to permit developers an assured base of operations. But the use of functional or performance language in legislation opens doors either to coordination of policies or increased confusion. The quality of administration will, in the long run, determine the result. It would seem that the planning scope indicated properly considers housing code administration as a ''tool'' to accomplish a more comprehensive objective.

If present trends continue, it will become increasingly necessary to construct more effective interrelationships and overall program development. It is hardly necessary to emphasize that the lack of clear boundaries, and the competition of aggressive administrative personnel, can lead either toward effective environmental controls or into new depths of confusion. But this coordination is not entirely controllable at the local level of government. There must be responsiveness and even leadership from central (i.e., State and Federal) governments. The need is increasing as local governments find themselves dependent upon central government aids. It is to be hoped that research can be encouraged to bridge these problems.

The second type situation relates to coordinating public housing development, urban renewal, relocation of families, public works and private inroads on housing supply with code enforcement. There have been relatively few examples of effective interunit working relations discovered in studying code administration, and this problem deserves more examination. An addenda to this problem is the relationship to public and private service agencies, particularly welfare and community chests. There is a somewhat neglected coordination of welfare allotments for housing and the impact of code enforcement on low-rental rates.

C. Federalism: Towards Environmental Systasis

Earlier chapters discussed this need of united governmental effort, or systasis, to use an old political science term, to correct defects in housing code administration and enforcement. The four subsections following deal further with the need for collaboration or alliance between the several levels of government, city-town, country, regional, State and Federal, to develop, plan and administer effective housing code programs.

8. IMPACT OF FACTORY-BUILT HOUSING

The intimate connection between the dwelling unit and the immediate neighborhood as determinators of livability has been slow to develop in the american system.

But when three-fourths of the new, nonfarm, single-family detached homes selling at less than $15,000 produced are factory built and compacted so that provision for normal functions increasingly must be accomodated by out-of-dwelling facilities, the issue is at least clarified.

While governments are providing public housing at unit costs of some $20,000 per family and these are being made available as a normal expectancy for unemployables, struggling workers exercise their free choice and live in relatively unsubsidized $5,000 to $10,000 mobile homes. Since complex civilizations are hardly built on unemployables, the situation is anomolous.

Present policies of governments make little provision for mobile or ''relocatable'' homes. The problem seems left primarily to zoning controls and most cities deal harshly with the humanitarian side of the problem. Many cities simply ban such units. This forces them into suburban or exurban areas where services and facilities are at a minimum, or not within walking distance. Sometimes such units are zoned in the classification with industrial uses, or even with junk-yards. Children in such circumstances are less the concern of governments than are those in the so-called ghettos.

Since factory-built units, mobile or otherwise, thrive in spite of governmental antagonisms, it is reasonably certain they will play an increasing role in our society. No other subject in the housing spectrum offers greater potential than the factory-built units and components and the development of environmental implementation systems. There is no functional aspect of housing regulation more important than the development of programs to make livability more adequate in mobile home parks or communities. The key perspective should be the balancing of subsidies already considered valid in public housing, against wishes and citizenship values that ensue from home ownership, even though the home is most modest in its worth and space.

It should be noted that cooperatively developed standards have been accepted by the Mobile Home Manufacturers Association and that the quality, safety and durability of such units have made, and continue to make, strides ahead. The problem, at present, is centered upon the location and environmental supplementation of such units.

The APHA-PHS code is, however, essentially concerned with the dwelling unit. The mobile home problem is primarily one of extra-dwelling environmental controls. The structural elements and arrangements must be controlled at place and time of manufacture. Crowding and misuse of units are properly use and occupancy matters, and as such within the housing code's reach. Otherwise the recognition of the Association's seal can be a basis for licensing admittance to a park or community. The basic problems relate to common facilities, playgrounds, recreation resources, schools, libraries, health and welfare services and the availability of transportation to places beyond walking distances. These matters are better dealt with through an expanded concept of land-use planning than through an expanded housing, or a new, code.

9. CONCEPTS OF REGULATION: ROLE OF LICENSING

Housing code administration places the responsibility for initiative on the administrator. He, or his inspectors, intervene in the privacy of homes with or without advance notice. They may or may not have previous information relative to what they will find. Quite naturally, in light of our oldest traditions, this intrusion is resented. The Supreme Court has qualified the conditions under which it can be made operational when the occupant protests. This is a clumsy method of obtaining information and does not produce effective results in terms of producing data that results in imposing penalties. The imposition of penalties is so conditioned that the ability or capacity of the owner-occupant or landlord to meet code requirements because of financial reasons may or may not have a bearing on ''criminal intent.''

Housing code administration is essentially a self-contained administrative function. It is not developed as a factor in obtaining basic information about housing supply in terms of rent levels or with concern for the size or condition of families. It is essentially a projection or expansion of the police function, although it is focused upon a complex social and economic composite. It is conceived much as is a building code; but the latter code, or combination of specialized codes, is directed to correct conditions that are clearly related to structural safety and supported by established engineering expertness. Building codes can be, and usually are, relatively explicit. In the language of the business, they are called ''specification type'' provisions. Such provisions are essential when communication is to be clearly established with craftsmen and builders who know little or nothing about professional engineering. But housing codes can only be ''specification'' by sacrificing the quality of expertness and this has proved to be an insurmountable problem.

Housing code administration should contribute greatly to the available information pool that is necessary to plan or program the meeting of future housing needs. There is justification for the conclusion that the regulative scope and emphasis in housing code substantive provisions should be developed for a specific enforcement area only after basic information and assessment of economic capacities are in hand. This has not been the case. Substantially the same scope of provisions is considered necessary throughout the country, when urban development involves federal help. Accumulation of information necessary for effective program development is not even made a criterion in this relationship.

The recommendation is advanced, at least for purposes of experimentation with grant monies, that housing code administration be shifted to a different frame of reference. The initiative can, and should, be shifted to the owner, whether he is occupant or landlord. It should be his responsibility to submit elemental data relative to his dwelling unit. Perhaps only rental housing, which gives by far the most difficulties in administration, should be experimentally placed in a licensing system; perhaps only low and middle-low rental properties. But the applicant should be permitted to plead ignorance, after a comprehensive and explanatory educational program, only in exceptional cases. Even these can be reduced over a period of time. The applicant's failure to return the application, or to correctly provide accurate information likewise may present problems, but help can be offered. At least the problem of entry is reduced to more manageable proportions and the courts will be better satisfied.

More attention can be given to information related to environmental needs outside of the dwelling unit. This is especially true if the program is paralleled with developments in land-use planning agencies relative to expanded information concerning land uses generally. Relation to services and facilities can help determine the permissible density in and the public utility value of locations, a matter now practically ignored. Some estimate of neighborhood life expectancy can be equated into the process of determining possible relaxations of standards or applying categories of restraints related to economic perspectives. Certainly it is not common sense to consider that the same requirements, especially those having retroactive effect and slight relationship to health or safety, should be imposed upon buildings scheduled for demolition within a short time as are imposed on buildings having an indefinite life expectancy. But decisions such as these cannot be intelligently made under the present approach. Administrative units and record systems are too separate and independent. Local governments are finding it most difficult to find political leadership to coordinate programs not resultant from locally stimulated sources. It is easier for Washington to sponsor separate projects and programs than to find effective leadership where there are too few dynamic followers. This is a condition inherent in democratic hierarchies.

Both for reasons of attaining a higher level of justice and the improvement of program planning so that physical and housing data can be brought into a common focus, the use of licensing is strongly recommended. Certainly it will require a different order and, in the immediate future, increased direct costs. In the long run, the potential far outweighs these factors. And only the most obvious elements have been noted in this brief commentary.

10. HOUSING: AN EMERGING PUBLIC UTILITY?

That housing codes unduly depend upon police methods and criminal penalties has been previously emphasized. This troublesome administrative approach needs reconsideration, and as noted, experimentation with a licensing system has been recommended. Reliance upon a licensing system, at least for rental housing within the bargaining power of welfare clients and retired or pensioned families in somewhat parallel situations, would simplify the development of a program utilizing public utility precepts. Whatever is undertaken, some subsidy element must be seriously considered if useful housing resources are to be brought, and maintained, in conformity with codes.

The administrative hearings should utilize the expertness of administration to deal with hardship pleas. The hardship plea here acquires the assertion that compliance with the code will not make a reasonable profit even with prudent management. There is no justification for orders to be confiscatory, or to benefit one class of citizens at the expense of another.

The licensing or permit application should be designed to obtain significant information useful for planning purposes beyond the function of the housing code enforcement agency. This element must be emphatically recognized. If the application involves disclosure of rental rates, these rates should be subject to scrutiny to determine that services and rates balance. Already housing code administrations are presumed to be able to determine market value of buildings as composites of housing units; they are presumed able to determine costs to meet code requirements and also values of buildings after compliance. Most administrations include authority and duty to order abandoned those buildings in which a cost to market value ratio exceeds a predetermined ratio. In other words, it is within the range of present expertness to determine whether the rental market will produce a reasonable or unreasonable return. Certainly no substantial burdens would be involved in consideration of mortgages, liens or other similar factors which involve expenses. Tax figures are no problem. Taken together the present machinery should be quite capable in determining values, fixed charges, and estimating reasonable operating expenses as well as market conditions. All of these elements, taken together and focused to determine whether or not a rental property is commercially useful or not is within presumptive competence. If, to these, is added a policy condition as to what a fair profit should be, the essential elements of public utility are present.

Administrators should not be in a position to be expected to see that retroactive requirements are imposed under circumstances that reasonable profits for prudent investments and reasonable managerial competence will not be forthcoming. The exception to this principle is that some dwellings may constitute serious threats to human health or safety. These should be dealt with summarily in the public interest. But most housing code violations are not in this category; they are neither nuisances nor nuisance-like; they are simply matters of convenience and determinants to see that ''better'' housing is made available. Such undertakings are in no way questioned as being good politics or an expression of humanitarian enthusiasm. But such costs are not properly assessable against a segment of the community; they should be borne by the community as a collective whole. In other words, most housing code compliance expenditures should be subsidized, if compliance is unreasonable to expect after an expert examination of the relevant circumstances. Curiously, no high-court case seems to have considered this problem; there is the most obvious case to be made that forcing landlords and owner-occupants to meet costs to please the interests of administrators seeking to enforce most housing code provisions is simply confiscation of property. The American theory and practice of public utility regulation is built upon elements considered in this analysis. The question that is unanswered is this: Why should landlords be forced to contribute to the well-being of unfortunate segments of the population when other businessmen dealing with the same constituency are not? It should be noted that California is the only state that limits the application of housing codes in retro-active situations.

If the premise is established that APHA-PHS codes should be enforced, the licensing-public utility perspective seems the most reasonable approach. It is necessary to include a subsidy factor. In cases in which landlords plead hardship under proposed rate schedules, it should be a public decision whether to exercise eminent domain or to subsidize. In no case should the landlord be allowed to charge an excessive rent, and the tenant should have the right to protest. Such a straightforward approach would eliminate the widespread hostility that exists between landlords and tenants, with housing code administrators in the middle, and without authority or means to effectuate fairness or assess responsibility.

When the government decided to go into public housing subsidization on a grand scale, the competition between public and private housing became inevitable. The public housing policies have not increased rental rates as rapidly as private landlord costs have risen. This is true in the great majority of cities. Only the stigma of public housing that develops when selectivity of tenants is downgraded keeps the demand for public housing within bounds. Welfare payments do not differentiate between families in subsidized housing and private non-subsidized dwelling units; in effect this means that welfare families living in public housing are given a double subsidy. A strong feeling has emerged that the welfare allotments for housing are influenced by public housing rental rates. At least there is need for more effective consideration of the relationship of these elements. Without this problem in perspective and considered in policy determinations, the enforcement of housing codes can lead toward increasing demands for double subsidies by the poor, even overcoming the stigma which is recognizable in many places.

The owner-occupant with small pension income that is relatively fixed, is in a bind when he is told that the home he has lived in for years has been classified as sub-standard and requires extensive expenditures to make it comply with a new law. What are the realistic alternatives? He can sell and move into public housing where his neighbors will not be of his own choice; this is provided he can find room. He will have trouble selling his family home because the new code has decreased its value as it must be ''improved'' to be a proper place to live. Perhaps he can get enough for the old place to buy a mobile home. At this point, the government is really little concerned if he finds some out of the way place to locate his new habitation. Is he better off? Is the public interest served? Another out: if the place is unmortgaged, he may be able to spend his last days knowing that he lives in a legal place after long years in what has become a slum property.

II. HOUSING AND FEDERALISM

There is no ''system'' of housing regulations in the United States. This is not because the federal principle encourages States to experiment. States have conspicuously avoided experimentation. In general, they have been content to delegate power to local governments to participate in federal programs. This has resulted in housing code administration having little coordinated relations with other regulative systems or with service administration.

Since the APHA-PHS code permeates the various modifications approved by HUD or its predecessor, a more or less consistent pattern has spread over American cities. No State seems to have undertaken to provide guidance to see that enforcement is coordinated into other related programs. This is left to local governments, and HUD has treated code administration as a more or less discrete unit.

If HUD coordinated its public housing, finance guaranteeing, and its urban renewal programs, the relative independence of housing code administration would be modified. If HUD provided guidance as readily as it makes funds available, coordination would have developed. It can hardly be imagined that housing regulation can be the well-being of unfortunate segments of the population when other businessmen dealing with the same constituency are not? It should be noted that California is the only state that limits the application of housing codes in retro-active situations.

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11. HOUSING AND FEDERALISM

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If HUD coordinated its public housing, finance guaranteeing, and its urban renewal programs, the relative independence of housing code administration would be modified. If HUD provided guidance as readily as it makes funds available, coordination would have developed. It can hardly be imagined that housing regulation can be integrated into welfare subsidy policy under present conditions so that the double subsidy for welfare families in public housing would be made a factor in alloting money for shelter.

If the federal principle is to work in housing program development, a clearer delineation of functions responsible at different levels is essential. Although States have been relatively unconcerned with housing matters, and when concerned—as in New York--have developed what is best characterized as competing rather than coordinated programs, there is some indication that policies are in rather basic process of change. This emergence of interest will, however, make demands upon national policies. When States seriously undertake to provide better housing accomodations, they will inevitably attract numbers of unemployed and unemployables. This will increase service costs, particularly education, welfare and health. If humanitarian motivation is not to be punished by increased burdens affecting competitive place in the scheme of things, the problem of the poor will have to be equalized by ''Washington''. This will be particularly so if significant developments of mobile home or pre-built housing is to be utilized. Local governments are largely financed through property taxes. Small-propertied families are inherently a drain on government funds. The role of the national government must be to equalize and encourage humanitarian experimentation. Housing will probably be at the center of this policy problem. The felt need is greatest to provide better housing for the poor. The ancillary, and part of the direct, costs must be distributed over the national tax base. This is not possible with blanket grants; it must reflect effective experimentation.

A hopeful sign of the emergence of state governmental interest in housing problems has been the circulation of materials suggesting better cooperative efforts and possibly interstate conferences on policy matters. Historically the States have been the repository of the basic service and control systems. If the demand for improved housing is registered in Washington with greater impact than in the several States, the inevitable consequence will be the crystalization of direct national-local relations, and the by-passing of the States other than to require enabling delegation of power to local governments to cooperate with national programs. This state of affairs is becoming consciously recognized in a number of States, and it is not too late to work out more effective intergovernmental programs. An almost untouched field exists for States to develop coordinated programs and project these into operation through training administrators in both state and local governments.

A noticeable and potential element in the intergovernmental changes that can be detected is the rising importance of counties at the expense of cities. The metropolitanization of much of the country is destroying the capacity of cities to plan effectively. Systematic regulation of housing programs will inherently involve the interrelationships of city, suburb and surrounding areas. Counties are better structured to meet this change because they cover the entire countryside. Except in New England where they have never superseded townships, the country is the easier unit to incorporate into statewide plans. It is more of an agency of states than are cities, and it has more effective enforcement machinery; cities usually do not have public prosecutors and are handicapped in this respect.

The National Association of Counties has recently submitted a proposal to HUD to undertake the development of mobile home and pre-built unit regulation as a function to be coordinated with county planning. This should be a forerunner of county assumption of other regulative programs, particularly building and fire prevention codes. A movement is well along in transferring service functions, particularly health, and to a less extent, welfare, to counties. It is to be hoped that the discussions and research necessary for effective transfer will include a component to facilitate more effective environmental regulation in coordinated patterns.

The development of factory-built homes and other buildings into communities, under the guidance of county authorities who are able to balance the opportunities and limitations of various subsidy programs, will increase the chances for an integrated approach to considering the dwelling unit a segment of the housing-environmental systasis. This perspective is also an opportunity for coordination of HUD, DOT and HEW through developing integrated programs.

12. ADMINISTRATIVE SYSTASIS IN PUBLIC ADMINISTRATION FOR ENVIRONMENTAL PROGRAMS

The extreme difficulty in dealing with problems in the housing code enforcement field, which have been reviewed in this document, can be attributed in summary to an almost complete lack of coordination between the three levels of government. Some guidance activities have been performed on the Federal level by the Public Health Service and Housing and Urban Development agencies, but most administration has been dumped on the local level. There has been very little acceptance by the States in assuming their logical area of responsibility. With only nine exceptions, the States have been prone merely to enact enabling legislation, which local governments can use if desired. The role of the States in supplying leadership and technical assistance has been generally ignored. The author feels that each of the three levels of government should develop their roles in an environmental program such as that discussed in this book through the use of policy making and administrative systasis.

Systasis is characterized by a chain of communications and a planned division of labor between several levels of government concerning a specific goal or objective of public administration. Such an alliance is frequently needed to accomplish environmental or ecological programs. Systasis requires coordinated or supportive action at each level of administration, and may further require mutual action by the legislative branches of each level. The end result of the legislative and administrative collaboration should produce a record of reasonable regulations, plans, administrative findings, inspections, hearings and orders, which may be reviewed by the courts at the appropriate levels to assure reasonableness, equity, and compliance.

The housing code administration and enforcement program may be used as an illustration of the nature of systasis in public administration which this book has found necessary to overcome the difficulties and disappointments which have plagued that environmental program. The Federal level can best undertake the necessary research regarding health and safety criteria (PHS), and economic and technological criteria (HUD) which should enter into performance and specification standards. It can properly recommend, through guidelines and technical assistance, the policies which would fit housing code work into plans articulated with the housing supply and environmental health programs. The States, in addition to enacting mandatory State-wide performance standards and permissive specification codes or regulations for local adoption, should use their professional expertise in health and other departments to set forth the health, social, economic, and physical conditions which serve as determinants of the standards to be applied in any specific neighborhood enforcement area. The regional, county, or municipal governments should adopt local specification codes suited to the conditions found within their borders. In planning a code administration project for any specific area, they should ascertain and make administrative findings regarding the health, social, economic and physical conditions prevailing, in order to establish which standards, basic I, II, III or full code, should be enforced. The local administration, if it so decided, could also make such findings and decisions in connection with licensing and permit situations that would be enforced throughout its jurisdiction in all rooming or dwelling rentals or other types of housing catering to particular health and physical conditions and economic markets. The local government should involve the owners and residents of an area in the planning of the housing regulation program and gain their participation in modernizing the neighborhood common spaces and other facilities. The local governments would carry out the inspection of premises and administer hearing procedures as discussed above. The total administrative network resulting from the collaborative effort would then have produced a record which could be reviewed in court as needful. Such a systasis could also accomodate the other aspects of health and housing programs described in the four preceding sections.